

Problems and Recommendations in Disciplinary Enforcement

AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE
ON EVALUATION OF DISCIPLINARY ENFORCEMENT

American Bar Association

CAUTIONARY NOTE

This final draft of *Problems and Recommendations in Disciplinary Enforcement* has been prepared by the Special Committee on Evaluation of Disciplinary Enforcement of the American Bar Association. It has not been acted on by the American Bar Association.

**AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE
ON
EVALUATION OF DISCIPLINARY ENFORCEMENT**

**Tom C. Clark, Chairman
Washington, D.C.**

**John G. Bonomi
New York, New York**

**Joe J. Harrell
Pensacola, Florida**

**Fred B. Hulse
Sedalia, Missouri**

**Robert W. Meserve
Boston, Massachusetts**

**David W. Richmond
Washington, D.C.**

**John A. Sutro
San Francisco, California**

**Michael Franck, Reporter
Lansing, Michigan**

TABLE OF CONTENTS

	Page
Preface	xiii
Section I — The Present Status of Disciplinary Enforcement	1
Section II — The Inherent Power of the Court to Supervise the Disciplinary Process	10
Section III — 36 Problems and Recommendations in Disciplinary Enforcement	19

PART A — Financing, Structure and Staff

Problem 1 — Inadequate financing of disciplinary agencies for investigations and the conduct of proceedings .	19
1. Dimension	10
2. Recommendation	20
3. Discussion	20
Problem 2 — Local and fragmented nature of the disciplinary structure	24
1. Dimension	24
2. Recommendation	24
3. Discussion	24
Problem 3 — Cumbersome structures that result in an inordi- nate time gap between the inception and conclusion of disciplinary proceedings	30
1. Dimension	30
2. Recommendation	30
3. Discussion	31
Problem 4 — Ineffective rotation of the membership of disciplinary agencies	39
1. Dimension	39
2. Recommendation	39
3. Discussion	39

REPORT ON DISCIPLINARY ENFORCEMENT

Problem 5 — Nonrepresentation of substantial segments of the bar on disciplinary agencies	46
1. Dimension	46
2. Recommendation	46
3. Discussion	46
Problem 6 — Inadequate professional staff	48
1. Dimension	48
2. Recommendation	49
3. Discussion	49
Problem 7 — Absence of training programs for disciplinary agency staffs	57
1. Dimension	57
2. Recommendation	57
3. Discussion	57
PART B — Practice and Procedure	
Problem 8 — Few investigations initiated without specific complaint	60
1. Dimension	60
2. Recommendation	61
3. Discussion	61
Problem 9 — Government attorneys, house counsel for corporations and other attorneys who are not subject to discipline in the jurisdictions in which they actually practice	67
1. Dimension	67
2. Recommendation	68
3. Discussion	68
Problem 10 — Insistence by disciplinary agencies on unnecessary formalities, including verification of complaints	71
1. Dimension	71
2. Recommendation	71
3. Discussion	71
Problem 11 — Lack of absolute immunity for persons filing complaints with a disciplinary agency	74
1. Dimension	74
2. Recommendation	74
3. Discussion	74

Problem 12 – No permanent record of complaints and their processing	77
1. Dimension	77
2. Recommendation	78
3. Discussion	78
Problem 13 – Processing of complaints involving material allegations that also are the subject of pending civil or criminal proceedings	82
1. Dimension	82
2. Recommendation	82
3. Discussion	82
Problem 14 – Absence of subpoena power in the disciplinary agency	86
1. Dimension	86
2. Recommendation	86
3. Discussion	86
Problem 15 – No provision for compelling the testimony of witnesses and respondents in disciplinary proceedings by granting them immunity from criminal prosecution	89
1. Dimension	89
2. Recommendation	90
3. Discussion	90
4. Proposed statute	91
Problem 16 – No informal admonitory procedures to dispose of matters involving minor misconduct	92
1. Dimension	92
2. Recommendation	92
3. Discussion	92
Problem 17 – Treating serious misconduct complaints as private disputes between attorney and client	97
1. Dimension	97
2. Recommendation	97
3. Discussion	97
Problem 18 – Inadequate procedures for accepting resignation from attorney under investigation	101
1. Dimension	101
2. Recommendation	101

REPORT ON DISCIPLINARY ENFORCEMENT

3. Discussion	101
4. Proposed rule	104
Problem 19 — No provision for service by mail, publication or other means when respondent cannot be personally served	106
1. Dimension	106
2. Recommendation	106
3. Discussion	107
Problem 20 — Inadequate provisions for dealing with attorneys incapacitated by reason of mental illness, senility or addiction to drugs or intoxicants ...	110
1. Dimension	110
2. Recommendation	110
3. Discussion	110
4. Proposed rule	112
Problem 21 — Inadequate provisions for reciprocal action when an attorney disciplined in one jurisdiction is admitted to practice in other jurisdictions ...	116
1. Dimension	116
2. Recommendation	118
3. Discussion	119
4. Proposed rule	121
Problem 22 — No provision for suspension pending appeal of attorneys convicted of serious crime before the disciplinary proceeding based on the conviction is concluded	122
1. Dimension	122
2. Recommendation	122
3. Discussion	122
4. Proposed rule	128
Problem 23 — No provision making conviction of crime conclusive evidence of guilt for purposes of the disciplinary proceeding based on the conviction	
1. Dimension	131
2. Recommendation	131
3. Discussion	132
4. Proposed rule	134

Problem 24 – Permitting disciplinary proceedings to be tried by jury	136
1. Dimension	136
2. Recommendation	136
3. Discussion	136
Problem 25 – Inadequate provisions concerning public disclosure of pending disciplinary proceedings	138
1. Dimension	138
2. Recommendation	138
3. Discussion	138
Problem 26 – Failure to publish the achievements of disciplinary agencies.	143
1. Dimension	143
2. Recommendation	143
3. Discussion	143
Problem 27 – No provision for protecting clients when an attorney is disciplined, or when he disappears or dies while under investigation	147
1. Dimension	147
2. Recommendation	148
3. Discussion	148
Problem 28 – Disbarred attorneys too readily reinstated by the courts	150
1. Dimension	150
2. Recommendation	151
3. Discussion	151

PART C – Interagency Relations

Problem 29 – No procedure for notifying disciplinary agencies when attorneys admitted to practice in their jurisdiction are disciplined elsewhere	156
1. Dimension	156
2. Recommendation	158
3. Discussion	158

REPORT ON DISCIPLINARY ENFORCEMENT

Problem 30 – No consultation and exchange of information among disciplinary agencies about their mutual problems in disciplinary enforcement 161

- 1. Dimension 161
- 2. Recommendation 162
- 3. Discussion 162

PART D – Ancillary Problems

Problem 31 – Reluctance on the part of lawyers and judges to report instances of professional misconduct . . . 167

- 1. Dimension 167
- 2. Recommendation 167
- 3. Discussion 168

Problem 32 – No requirement that attorneys keep accurate records of client funds in their possession and have the records audited 172

- 1. Dimension 172
- 2. Recommendation 173
- 3. Discussion 173

Problem 33 – No training courses on ethical standards and disciplinary enforcement for judges responsible for lawyer discipline 175

- 1. Dimension 175
- 2. Recommendation 175
- 3. Discussion 175

Problem 34 – Attorneys accused of crime given preferential treatment by law enforcement authorities and the courts 179

- 1. Dimension 179
- 2. Recommendation 179
- 3. Discussion 179

Problem 35 – No state-wide registration of attorneys (applicable to non-integrated jurisdictions only) . . . 183

- 1. Dimension 183
- 2. Recommendation 183
- 3. Discussion 183
- 4. Proposed rule 184

Problem 36 — Limited ancillary bar association services to
complement the work of disciplinary agencies . 186

- 1. Dimension 186
- 2. Recommendation 186
- 3. Discussion 186

Section IV — Attempts to Provide More Effective Disciplinary
Enforcement 192

PREFACE

The Special Committee on Evaluation of Disciplinary Enforcement was created at the Midyear Meeting of the American Bar Association in February, 1967. The Committee was charged with the following responsibilities:

To assemble and study information relevant to all aspects of professional discipline, including the effectiveness of present enforcement procedures and practices and to make such recommendations as the Committee may deem necessary and appropriate to achieve the highest possible standards of professional conduct and responsibility, and . . . that the study be carried out in cooperation with state and local bar associations.

The Committee initiated its study by sending questionnaires to state, county and city disciplinary agencies throughout the United States requesting detailed information concerning (1) their disciplinary structure, practices and procedures and (2) the problems encountered in disciplinary enforcement. On completion of this survey, the Committee conducted regional hearings throughout the United States at which judges and attorneys engaged in the disciplinary process discussed relevant problems and suggested corrective measures. Between March of 1968 and April of 1969, regional hearings were held in New York City, Washington, D.C., Miami, Denver, San Francisco, Boston, Dallas and Chicago. Representatives of every state and of many local disciplinary agencies attended.

The Committee decided that its report to the House of Delegates should be divided into two principal sections—the first to concern the present status of disciplinary enforcement throughout the nation and the second to discuss in detail major problems in disciplinary enforcement and recommendations for their resolu-

tion. The Committee also decided to circulate the problem discussions and recommendations to judges and attorneys engaged in the disciplinary process for comment, thereby obtaining the benefit of their knowledge and experience.

In deciding on the format of its report, the Committee was mindful of the fact that a distinguished predecessor committee, the Special Committee on Disciplinary Procedures, in 1956 submitted a report in the form of a uniform model code of rules of court for disciplinary proceedings, *81 Reports of American Bar Association* 475 (1956). The Committee determined to utilize a broader approach, one that would consider all phases of the disciplinary process and would not be restricted to recommendations for codification into court rules.

The Committee proposes that the detailed implementation of its specific recommendations be delegated to a permanent, professionally staffed National Conference on Disciplinary Enforcement. This conference would on request (1) assist state and local disciplinary authorities in evaluating the effectiveness of their enforcement practices and procedures and (2) recommend specific improvements tailored to the individual and varying needs of the particular jurisdiction.

The Committee has arrived at some general conclusions concerning the "ideal" disciplinary structure and its implementation. It recommends that the structure be centralized by vesting exclusive disciplinary jurisdiction in the state's highest court under a procedure promulgated and supervised by the court in the exercise of its inherent power to supervise the bar.

All matters involving allegations of misconduct on the part of an attorney are submitted initially to a professional staff for investigation. At the conclusion of the investigation, matters that do not warrant dismissal and cannot be concluded appropriately by administrative warning letter are referred for hearing before an inquiry committee. At the conclusion of this hearing, the matter is either dismissed, terminated by admonition or referred for formal hearing before a formal hearing committee. At the conclusion of a formal hearing, the record, together with the hearing body's findings of fact and conclusions, are transmitted to the governing board of the state bar or of the state bar association or to a statewide disciplinary board established in those jurisdictions in which the governing board would be overwhelmed by becoming directly involved in the disciplinary process. In states with a small

lawyer population, the statewide board could itself conduct the formal hearing and file its report and findings with the court, thereby eliminating one of the procedural stages. The reviewing board is authorized to review the proceedings held before the formal hearing committee, to approve or modify the recommendations and to file the proceeding in the state's highest court. The court will determine the matter finally on the basis of the record before the formal hearing committee and the briefs and oral arguments of the parties.

These stages are illustrated in the chart on page xvi.

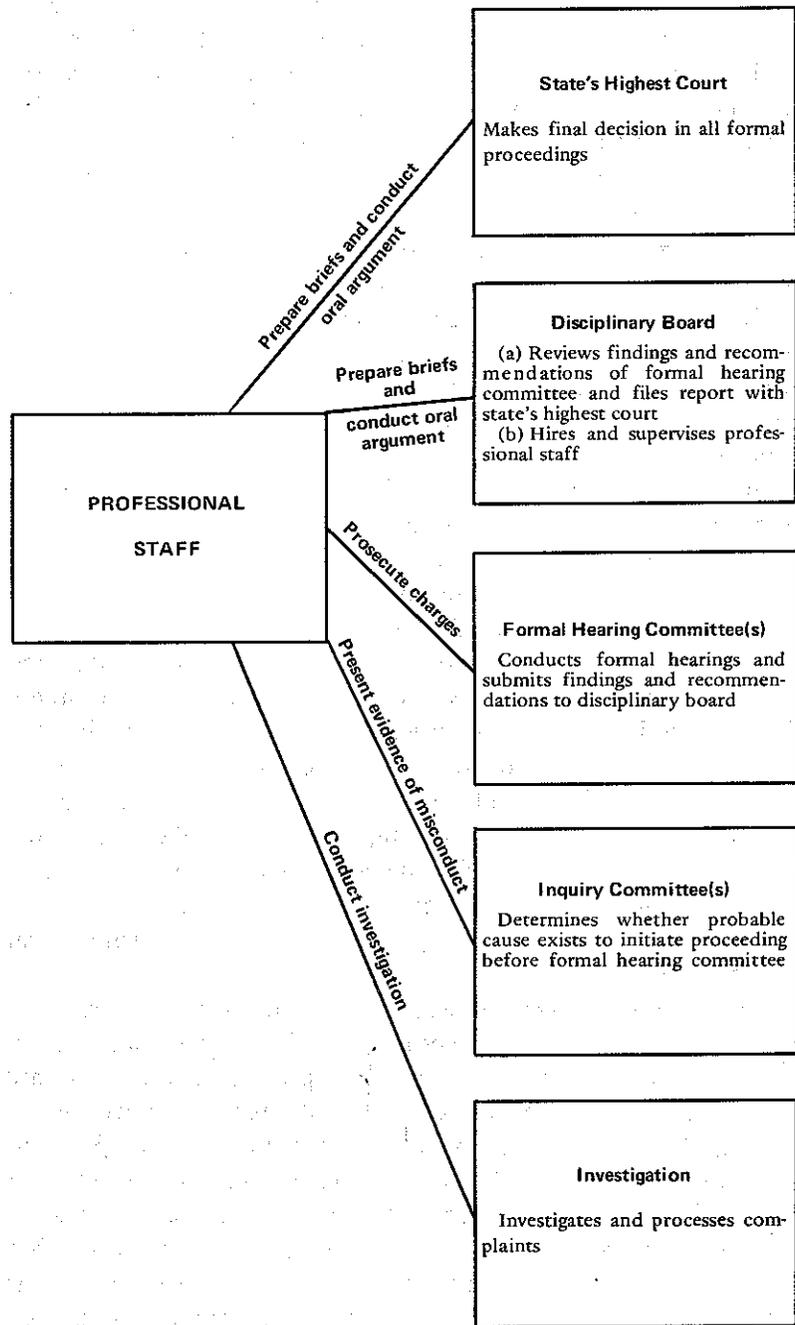
In addition to reviewing the proceedings before formal hearing committees, the statewide board also would be responsible for hiring and supervising the professional staff and determining all appeals by the professional staff from decisions of the inquiry committee terminating a matter without referral to a formal hearing committee.

This proposed structure would centralize the disciplinary process, would assure uniformity of discipline throughout the state and would place the least burden on the court by removing it from the trial process, while permitting the court to retain ultimate jurisdiction over the discipline of its officers.

The individual components of this structure are considered in the course of the discussions of the 36 problems and recommendations in disciplinary enforcement which follow in Section III. These have been divided into four sections. First, financing, structure and staff; second, practice and procedure (generally arranged in the order of the steps from complaint to final imposition of discipline and reinstatement); third, interagency relations; and fourth, ancillary problems not directly attributable to the operation of a disciplinary agency but having a substantial effect thereon.

The Committee has deliberately omitted any discussion of several relevant areas of concern. The adequacy of law school courses designed to promote pride in the profession and to elevate ethical standards and the effectiveness of present procedures to screen applicants for admission to the bar are subjects of substantial dimensions and require a special expertise. In view of the critical importance of these subjects to the maintenance of high standards in the profession, the Committee urges that consideration be given to the creation by the American Bar Association of appropriate committees, in conjunction with such

PROPOSED DISCIPLINARY STRUCTURE



interested organizations as the Association of American Law Schools and the National Conference of Bar Examiners, to survey these issues in depth. The Committee also has not considered the issue of whether self-discipline by the profession is preferable to lay participation in the disciplinary process. It has interpreted its mandate as limited to consideration of methods for improving the present system of self-discipline. The Committee recognizes, however, that if the profession itself does not implement necessary improvements in its enforcement structure, the public inevitably will assert the right to do so.

In recent months a new problem in disciplinary enforcement has arisen; it involves the attorney who acquiesces in or even participates in courtroom disruptions or disorders. Since at the time this problem became apparent the Committee's report was near completion, the Committee was faced with the alternatives either of incorporating a hastily prepared discussion of this complex subject or of delaying the submission of the report and recommendations to the House of Delegates. Neither of these undesirable alternatives became necessary, for the problem was assigned in the fall of 1969 to the Advisory Committee on the Judges' Function of the Special Committee on Standards for the Administration of Criminal Justice, for consideration in depth and the formulation of recommendations. Although this report, therefore, omits any specific reference to this problem, it should be noted that several recommendations in Section III—disciplinary jurisdiction over attorneys not regularly admitted to practice (Problem 9), reciprocal disciplinary action (Problem 21), and suspension pending appeal of attorneys convicted of serious crimes (Problem 22)—may relate to it.

In preparing its report and recommendations, the Committee has relied liberally on the testimony adduced in the course of the regional hearings. In order to assure that the testimony submitted would be absolutely frank, those who appeared were assured that their remarks would be kept confidential. For that reason, the quotations from testimony used in the text are attributed only by reference to the speaker's official position without identifying him.

The work of the Committee and the preparation of this report would not have been possible without the dedicated service of the Committee's Reporter, Michael Franck. Mr. Franck, who served as Administrative Counsel to the Committee on Grievances of The

REPORT ON DISCIPLINARY ENFORCEMENT

Association of the Bar of the City of New York until April of 1970 and who now is Executive Director of the State Bar of Michigan, has brought to the Committee his broad knowledge, experience and insight into the administration and problems of professional discipline enforcement.

The Committee also wishes to express its appreciation for the able assistance of Richard B. Allen, Executive Editor of the American Bar Association Journal, who edited this report; to David J. A. Hayes and Frederick R. Franklin, who provided valuable staff assistance; and to Charlie Donaldson, a student at the Harvard Law School who served as a research assistant during the summer of 1969.

SECTION I

THE PRESENT STATUS OF DISCIPLINARY ENFORCEMENT

After three years of studying lawyer discipline throughout the country, this Committee must report the existence of a scandalous situation that requires the immediate attention of the profession. With few exceptions, the prevailing attitude of lawyers toward disciplinary enforcement ranges from apathy to outright hostility. Disciplinary action is practically nonexistent in many jurisdictions; practices and procedures are antiquated; many disciplinary agencies have little power to take effective steps against malefactors.

The Committee has found that in some instances disbarred attorneys are able to continue to practice in another locale; that lawyers convicted of federal income tax violations are not disciplined; that lawyers convicted of serious crimes are not disciplined until after appeals from their convictions have been concluded, often a matter of three or four years, so that even lawyers convicted of serious crimes, such as bribery of a governmental agency employee, are able to continue to practice before the very agency whose representative they have corrupted; that even after disbarment lawyers are reinstated as a matter of course; that lawyers fail to report violations of the Code of Professional Responsibility committed by their brethren, much less conduct that violates the criminal law; that lawyers will not appear or cooperate in proceedings against other lawyers but instead will exert their influence to stymie the proceedings; that in communities with a limited attorney population disciplinary agencies will not proceed against prominent lawyers or law firms and that, even

when they do, no disciplinary action is taken, because the members of the disciplinary agency simply will not make findings against those with whom they are professionally and socially well acquainted; and that, finally, state disciplinary agencies are undermanned and underfinanced, many having no staff whatever for the investigation or prosecution of complaints.

In order to overcome these deficiencies and to establish a meaningful program of disciplinary enforcement, the Committee has formulated recommendations for fundamental changes in (1) the disciplinary structure and jurisdiction; (2) the financing of the disciplinary process; (3) the staffing of the disciplinary structure; (4) the acceptance within the profession of the need for effective disciplinary enforcement; (5) the exchange of information between disciplinary agencies concerning discipline imposed on attorneys admitted to practice in more than one jurisdiction; and (6) national coordination between the judges, disciplinary agency members and staff engaged in disciplinary enforcement.

The Committee emphasizes that the public dissatisfaction with the bar and the courts is much more intense than is generally believed within the profession. The supreme court of one state recently withdrew disciplinary jurisdiction from the bar and placed it in a statewide disciplinary board of seven members, two of whom are laymen. This should be a lesson to the profession that unless public dissatisfaction with existing disciplinary procedures is heeded and concrete action taken to remedy the defects, the public soon will insist on taking matters into its own hands.

Lack of Meaningful Statistics

The inadequacy of disciplinary practices across the nation is well illustrated by the Committee's inability generally to obtain much-needed, relevant statistical information, such as the number of complaints received by disciplinary agencies, administrative warning letters issued and private reprimands imposed. These statistics are unavailable because many disciplinary agencies keep no records at all and a substantial proportion of those that do are inconsistent, the quality and extent of their records depending largely on the conscientiousness of the chairman in any given year.

Present Practices Inadequate

The Committee has no reservations in concluding that the

present enforcement structure is failing to rid the profession of a substantial number of malefactors. For example, the testimony of representatives from state and local disciplinary agencies throughout the nation established that a majority of the states do not take disciplinary action against attorneys convicted of federal income tax violations. Although these states invariably prosecute an attorney guilty of converting the funds of a single client, they somehow have concluded that conversion of funds belonging to all the citizens of the United States does not constitute moral turpitude and, consequently, does not warrant disciplinary action. We have been told of innumerable instances in which disciplinary action against an attorney in one jurisdiction was not communicated to other jurisdictions in which he was admitted. We also have been advised that attorneys convicted of crimes, some of them very serious and clearly reflecting upon their fitness to continue to practice, often have been immune from effective disciplinary action because local disciplinary agencies followed a policy of deferring action until all appeals from the conviction have been exhausted. We have been advised that, particularly in states with a small lawyer population or in which disciplinary jurisdiction is vested in small local units, prominent lawyers guilty of misconduct receive an unofficial immunity from disciplinary action because of the reluctance of the disciplinary agency to proceed against them. It is clear, therefore, that present enforcement practices are inadequate to assure effective disciplinary action.

Reformation Is Needed

The Committee has found that, with few exceptions, the disciplinary structures of the states must be reformed. There must be more centralization, greater power and swifter action. Moreover, disciplinary action must be clear and certain. For example, the public is unable to comprehend why an attorney convicted of stealing funds from a client can continue to handle clients' funds; why an attorney convicted of securities fraud can continue to prepare and certify registration statements; why an attorney convicted of filing a fraudulent income tax return can continue to prepare and file income tax returns for clients; why an attorney convicted of conspiracy to suborn perjury can continue to try cases and present witnesses; why an attorney convicted of bribing officials of an administrative agency can continue to practice

before that very agency; or why an attorney convicted of a serious crime of any nature can continue to hold himself out as an officer of the court obligated to uphold the law and to support the administration of justice.

The point may be illustrated by one specific example taken from the testimony adduced before the Committee. The Internal Revenue Service became aware that a particular attorney was engaged in the wholesale bribery of a revenue agent in connection with audits of his clients' tax returns. An investigation was initiated, and the revenue agent was removed from office. Thus, the I.R.S. restored its own integrity relatively quickly. The attorney was indicted, tried and convicted of bribery. He prosecuted appeals all the way to the Supreme Court of the United States. Approximately three years elapsed from the date of the judgment of conviction until all appeals were exhausted. During those three years the attorney was free to continue to practice law, even before the Internal Revenue Service, the very agency whose representative he had corrupted.

In order to meet this situation effectively, there must be some provision under which an attorney may be suspended forthwith upon conviction for a serious crime. At present, in most jurisdictions as long as an appeal is pending in a criminal case, the attorney may continue to practice. The disciplinary process is stymied, public confidence in the profession is destroyed and continued depredations upon the public are made possible.

Exchange of Disciplinary Information

The Committee has found that there is no facility for exchange of information among disciplinary agencies across the country. A lawyer who is admitted to practice in several states and disbarred in one for serious misconduct is often able to continue to practice in the other states in which he is admitted simply because they are unaware of his disbarment. This lack of communication among disciplinary agencies seriously endangers the public, for a lawyer who is guilty of misconduct that causes his disbarment in one jurisdiction is not likely to behave any better in another. The Committee's attention has been drawn to a number of incidents in which an attorney disciplined in one jurisdiction had engaged in similar misconduct elsewhere.

The profession's laxity in this area cannot be excused on the ground that the disciplinary authorities in the disbarring jurisdic-

tion were unaware that the lawyer was admitted to practice elsewhere. We have uncovered cases in which a disciplined attorney was admitted on motion, having practiced elsewhere before, and yet the disciplinary authorities in the jurisdiction imposing discipline failed to notify the jurisdiction in which he had been admitted earlier of their action and the basis for it.

We even have found that in some states in which disciplinary jurisdiction resides in county courts rather than a statewide court, an attorney has been disbarred in one county without the disciplinary authority in the neighboring county knowing of it. The representatives of one such state advised us of instances in which an attorney had been disbarred in one city in that state but was able to continue to practice in a neighboring city.

Too Much Decentralization

We have found that in many states the disciplinary jurisdiction is so decentralized that members of a local legal community are required to discipline each other. As a result, the disciplinary agencies in these areas are reluctant to proceed against prominent lawyers. They fail to submit even serious cases to the court having disciplinary jurisdiction, and the local court, when a case is submitted to it, is reluctant to impose substantial discipline.

The profession is imposing an impossible burden upon itself when it expects a local bar of perhaps twenty lawyers to maintain effective discipline among its members. Can we criticize the public for its lack of confidence in a structure which insists that a serious complaint against an attorney should be processed and resolved by other lawyers who often are intimate friends of the accused and must face him daily in their own practices?

A decentralized structure, utilizing a multiplicity of disciplinary agencies and courts, also produces a substantial lack of uniformity in the discipline imposed, which often results in grave injustices. We have found that in many of our large urban centers the density of the lawyer population requires the creation of more than one grievance committee. Often there is no communication whatever among these grievance committees, which are serving the same community. The determination of a specific complaint depends largely on which of the several grievance committees is assigned to consider it. Because of unresolved philosophical differences in approach to discipline among these committees, an attorney who has converted a client's funds and has made

restitution may receive only a mild admonition from one committee but will be subjected to a formal court proceeding seeking his disbarment by another. These inconsistencies undermine not only public confidence in the disciplinary process, but that of the legal community as well.

The Disabled Lawyer

Many states have no provisions for coping with the problem of the attorney who is disabled by reason of mental illness or addiction to intoxicants or drugs but whose infirmity has not resulted in misconduct. The absence of such a procedure exposes the public to serious danger, for it prohibits any action against the lawyer known to be disabled before his disability has led to harm to his clients. What rationale can the profession provide for its failure to authorize the suspension of a lawyer who is involuntarily committed to a mental hospital and who thereby remains free to resume practice upon his release without any investigation into his fitness or capacity to do so? Or worse, how can we justify procedures that permit an attorney to continue to hold himself out as eligible to practice law and represent others while he himself has been adjudged incapable of handling his own affairs?

Independent Investigation

Few of the disciplinary agencies across the country have self-starting grievance machinery. Most do not initiate investigations without receiving a specific complaint. Sometimes this is due to the absence of initiative on the part of disciplinary authorities, but often it is the result of inadequate funds to retain an adequate staff to process complaints and initiate investigations. Reliance on complaints only will never uncover some of the most serious forms of professional misconduct—those that involve a conspiracy between the attorney and the client. The falsification of personal injury claims, immigration frauds to enable noneligible aliens to gain admission to the United States, tie-ins and fee splitting between attorneys and bail bondsmen—these are examples of areas of misconduct in which the client benefits as much as the attorney. Therefore, they are not likely to be reported by a client's complaint to a disciplinary agency. Unless adequate funds for professional staffs are provided to initiate large-scale investigations into these practices, the profession can never effectively police its own ranks.

Admonition Procedure

Many disciplinary agencies are not authorized to admonish attorneys under investigation but are required either to institute a formal disciplinary proceeding or to dismiss the complaint. Faced with these limited alternatives, they often dismiss complaints involving established minor misconduct, because the institution of a formal disciplinary proceeding would be unduly harsh, would waste the agency's limited manpower and financial resources on relatively insignificant matters and, particularly in large urban areas, would overburden the court having disciplinary jurisdiction. The dismissal of a complaint under these circumstances undermines public confidence in the disciplinary process and appears to condone the conduct of the accused attorney.

The complainant, who knows that the attorney has been guilty of misconduct but is unaware of the limited alternatives available to the disciplinary agency, will conclude that the dismissal evidences the profession's disinterest in effectively policing its members. The accused attorney may consider the dismissal as an indication that the disciplinary agency is either ineffective or disinterested. The deterrent effect of an informal but timely admonition is lost and the attorney may involve himself later in more substantial misconduct that might have been avoided. In jurisdictions where no permanent record of dismissed complaints is maintained, and there are many, dismissal may immunize the attorney guilty of minor misconduct against substantial discipline. An isolated complaint of misconduct may be dismissed, because standing alone it does not warrant the institution of a formal proceeding. If no record is kept of the dismissal, subsequent complaints of a similar nature against the same attorney also will be treated as isolated acts of minor misconduct and dismissed. If disciplinary agencies were authorized to dispose of these matters by informal admonitions and permanent records were maintained, subsequent complaints against the same attorney evidencing a continuing course of misconduct might result in the institution of a formal proceeding and more substantial discipline.

Lax Reinstatement Practices

The inadequacies that pervade our disciplinary structure even affect cases in which substantial discipline is imposed. Many courts reinstate disbarred attorneys as a matter of course without any investigation of their fitness to resume the practice of law. Not

infrequently, a lax reinstatement policy results in serious harm to the members of the public who, following reinstatement, repose their trust and confidence in the disbarred attorney, relying on the assurance of integrity inherent in the license to practice law. In one case, an attorney was suspended, reinstated, disbarred, reinstated, and once again disbarred. There is no guarantee that he will not be reinstated again once some period of time has elapsed during which he avoids engaging in any known impropriety.

Some states do not even require the passage of a minimal period of time before considering the disbarred attorney's application for reinstatement. In fact, in several jurisdictions it is possible for the attorney who has been disbarred to be reinstated before an attorney who has been suspended for a specific period of time. This possibility exists because the suspended attorney must await the expiration of the period of suspension before seeking reinstatement, while the disbarred attorney has no such requirement blocking his path.

Recommendations Need Action

The Committee has formulated recommendations for fundamental changes in the disciplinary structure to meet each of these deficiencies and others that have not yet been mentioned specifically. These appear in Section III and have been circulated to disciplinary authorities and judges throughout the country in order to enlist their expertise in the effort to frame meaningful and effective reforms.

We urge disciplinary agencies across the country to establish committees to re-evaluate and revise their disciplinary structures and to implement the recommendations of this Committee.

One of the Committee's proposals is the establishment of a professionally staffed National Conference on Disciplinary Enforcement, sponsored by the American Bar Association, to coordinate enforcement efforts across the country and to cooperate with the states in improving their own disciplinary structure. The establishment of this conference will be a useless gesture, however, unless there is an agency of the organized bar in each of the states ready and willing to accept the assistance the American Bar Association will be able to provide.

The profession does not have much time remaining to reform its own disciplinary structure. Public dissatisfaction is increasing. Proposals for public participation in the disciplinary process

already have been made and, in at least one instance, have been implemented. Unless the profession as a whole is itself prepared to initiate radical reforms promptly, fundamental changes in the disciplinary structure, imposed by those outside the profession, can be expected. It is appropriate to quote a portion of the annual report of a state bar association ethics committee: "A good and decent profession has a headache that cries out for fast relief. We have been put on notice repeatedly. We will compound our own cure or someone will mix up a dose which will curl our hair."

SECTION II

THE INHERENT POWER OF THE COURT TO SUPERVISE THE DISCIPLINARY PROCESS

The concept that attorneys are officers of the court is universally recognized. In every state admission to practice lies within the jurisdiction of the courts. Legislative authorizations for automatic admission to practice upon the fulfillment of stated prerequisites, such as graduation from a particular law school, have been struck down as an unconstitutional interference with the inherent power of the courts to prescribe qualifications for admission:

. . . We are clearly of opinion that the act of 1887, though probably not so intended, is an encroachment upon the judiciary department of the government . . . It is an imperative command to admit any person to practice law upon complying with certain specified conditions . . . No judge is bound to admit, or can be compelled to admit, a person to practice law who is not properly qualified, or whose moral character is bad . . . The attorney is an officer of the court, and is brought into close and intimate relations with the court. Whether he shall be admitted, or whether he shall be disbarred, is a judicial, and not a legislative, question.

In re Splane, 123 Pa. 527 (1889)

It logically follows that the court having the power to admit a person to the practice of law should also be the agency having jurisdiction to fix the standards of conduct required of him and to remove his license to practice for cause:

The power of a court to admit as an attorney to its bar, a person

possessing the requisite qualifications, and to remove him therefrom when found unworthy, has been recognized for ages and cannot now be questioned. In fact, power of removal for just cause is as necessary as that of admission for a due administration of law. By admitting him the court presents him to the public as worthy of its confidence in all his professional duties and relations. If afterward it comes to the knowledge of the court that he has become unworthy, it is its duty to withdraw that endorsement, and thereby cease to hold him out to the public as worthy of professional employment.

In re Davies, 93 Pa. 116 (1880)

Nevertheless, state legislatures in some instances have enacted statutes setting substantive and procedural standards for the discipline of attorneys. These statutes may fragment jurisdiction over the bar by placing the removal power in an agency other than that which has the power to admit to practice and also abridge the traditional separation of powers among the executive, legislative and judicial branches of government. Legislative control over attorneys who are officers of the court vests in the legislature a powerful tool for interfering with the court's function:

... If the courts and the judicial power be regarded as an entity, the power to determine who should be admitted to practice law is a constituent element of that entity. It may be difficult to isolate that element and say with assurance that it is either a part of the inherent power of the court, or an essential element of the judicial power exercised by the court, but that it is a power belonging to the judicial entity cannot be denied. Our people borrowed from England this judicial entity and made of it not only a sovereign institution, but made of it a separate, independent, and co-ordinate branch of the government. They took this institution along with the power traditionally exercised to determine who should constitute its attorneys at law. There is no express provision in the constitution which indicates an intent that this traditional power of the judicial department should in any manner be subject to legislative control. Perhaps the dominant thought of the framers of our constitution was to make the three great departments of government separate and independent of one another. The idea that the Legislature might embarrass the judicial department by prescribing inadequate qualifications for attorneys at law is inconsistent with the dominant purpose of making the judicial independent of the legislative department, and such a purpose should not be inferred in the absence of express constitutional provision.

In re Cannon, 206 Wis. 374 (1932)

The doctrinal inconsistencies that may arise from attempts to establish legislative supervision over the disciplinary process perhaps could be overlooked if the legislature were equal to or surpassed the court as a vehicle for effective disciplinary enforcement. This, however, is usually not the case.

Many of the members of the state legislatures are themselves practicing attorneys, unlike judges who are not engaged in the practice of law. Many legislators, therefore, are likely to be directly affected by reforms in the disciplinary structure, and they are more likely to evaluate proposed reforms subjectively rather than by the standard of merit.

The legislative process itself is a far less desirable forum for meaningful reform of the disciplinary structure than judicial deliberation in chambers. Certainly judges are more immune from political pressures and passing public passions than are members of the legislative branch.

The element of compromise inherent in the legislative process also mitigates against a legislature's adoption of meaningful reforms in the disciplinary structure. Votes of nonlawyer legislators with respect to a controversial revision of disciplinary rules may be sought in return for commitments on legislation of particular interest to those legislators. Lobbyists intent on undermining a proposal for more effective supervision of improper practices in the profession are more likely to be able to assert their influence in the legislature than in a court.

The legislature also lacks the expertise of the courts concerning disciplinary enforcement. Few of its members will have had occasion to be involved in the disciplinary process. The members of the court having disciplinary jurisdiction, on the other hand, are involved with the day-to-day disciplinary process and are more familiar with its needs and shortcomings.

Finally, the legislature, having many other major concerns, is unlikely to devote the same deliberation to proposals for disciplinary reform as is the court, whose sole concern is the administration of justice.

These practical considerations demonstrate why legislative attempts to exercise supervision over the disciplinary process must be firmly resisted. The discipline of the legal profession is properly the exclusive concern and responsibility of the court having disciplinary jurisdiction.

In many states the legislature has either recognized the inherent power of the courts in this area or has been forced to do so by judicial decisions holding legislative interference unconstitutional. In some states, however, the issue has not been resolved, and the court having disciplinary jurisdiction occasionally has acquiesced in legislative interference in the disciplinary

process. This judicial passivity may become a contributing factor to ineffective enforcement, because proposed reforms in the disciplinary structure often are stymied in the legislature. In New York, for example, proposals to require members of the bar to register periodically so that their whereabouts may be known and to pay a fee to support the disciplinary structure and a client security fund have been introduced repeatedly in the legislature without adoption.

This Committee strongly urges courts having disciplinary jurisdiction to exercise their inherent power and to strike down any attempt by the legislature to interfere with their exclusive jurisdiction over the discipline of attorneys. There are ample precedents to support this position.

The inherent right of the court to supervise the bar as an incident to its power to admit attorneys to practice and to the fulfillment of its responsibility for the proper administration of justice has been stated repeatedly:

The [Nebraska] Constitution does not, by any express grant, vest the power to define and regulate the practice of law in any of the three departments of government. In the absence of an express grant of this power to any one of the three departments, it must be exercised by the department to which it naturally belongs because "It is a fundamental principle of constitutional law that each department of government, whether federal or state, 'has, without any express grant, the inherent right to accomplish all *objects naturally within the orbit of that department*, not expressly limited by the fact of the existence of a similar power elsewhere or the express limitation in the constitution' [Emphasis in original]

The primary duty of courts is the proper and efficient administration of justice. Attorneys are officers of the court and the authorities holding them to be such are legion. They are in effect an important part of the judicial system of this state. It is their duty honestly and ably to aid the courts in securing an efficient administration of justice. The practice of law is so intimately connected and bound up with the exercise of judicial power and the administration of justice that the right to define and regulate its practice naturally and logically belongs in the judicial department of our state government.

In re Integration of Nebraska State Bar Association,
133 Nebr. 283 (1937)

. . . The establishment by the [Massachusetts] Constitution of the judicial department conferred authority necessary to the exercise of its powers as a co-ordinate department of government. It is an inherent power of such a department of government ultimately to determine the qualifications of those to be admitted to practice in its courts, for assisting in its work, and to protect itself in this respect from the unfit, those lacking in sufficient learning, and those not possessing good moral character. Chief Justice Taney stated succinctly and with

REPORT ON DISCIPLINARY ENFORCEMENT

finality in *Ex Parte Secombe*, 19 How. 9, 13, 15 L. Ed. 565, "It has been well settled, by the rules and practice of common-law courts, that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counsellor, and for what cause he ought to be removed."

In re Opinion of the Justices,
279 Mass. 607 (1932)

The power to regulate and define the practice of law is a prerogative of the judicial department as one of the three divisions of the government created by article 3 of our constitution. The legislative department may pass acts declaring the unauthorized practice of law illegal and punishable. Such statutes are merely in aid of, and do not supersede or detract from, the power of the judicial department to control the practice of law.

People ex rel. Chicago Bar Association v. Goodman,
366 Ill. 346 (1937)

Courts often have been called on to consider the constitutionality of a statute seeking to supervise the conduct of attorneys against a challenge that the legislation is an unconstitutional interference with the powers of the judiciary. Faced with these challenges, courts either have struck down the legislation as an unconstitutional interference with their inherent power or have held that, while the legislature might properly set minimum standards, the courts could not be prevented from requiring their own and more stringent standards:

For the foregoing reasons we are of the opinion, first, that this court has original jurisdiction to hear any proceeding for the disbarment of an attorney who is admitted to practice before it. Second, that the power of disbaring an attorney for bad character or unprofessional conduct is inherent in the court, and is not, and cannot, be limited or taken away by the Legislature, though the latter may provide such other grounds of disbarment as it may see fit, and the court will accept them as sufficient. Third, that where it appears the attorney has been guilty of unprofessional or immoral conduct of such nature that in the opinion of the court he is unfit to continue as a practitioner, it is not necessary that the proceeding by which the matter is brought to the attention of the court shall comply with any particular form. It may follow the method set forth in the statute, and, if so, the court will hold it sufficient, but, even though it should not in form comply with the act, if the charges are such that the court considers them good grounds for disbarment, independent of the statute, and the attorney is given a full and adequate opportunity to make such showing as he thinks proper in defense thereof, they will not be dismissed because they depart in some degree from the method provided by the Legislature. Fourth, that the affidavit attached to the petition sets up matters which, if true, show respondent is guilty of such misconduct as should cause this court to suspend or disbar him.

In re Bailey, 30 Ariz. 407 (1926)

With these principles before us, we conclude that insofar as the 1933 "pardon statute" purports to reinstate, or to direct this, or any other, court to reinstate, without any showing of moral rehabilitation, an attorney who has received an executive pardon of the offense upon the conviction of which his disbarment was based, the same is unconstitutional and void as a legislative encroachment upon the inherent power of this court to admit attorneys to the practice of law, and is tantamount to the vacating of a judicial order by legislative mandate.

A somewhat analogous situation was presented in *Re Cannon*, 206 Wis. 374, 240 N.W. 441, 450, wherein an attorney was suspended from practice for two years. His reinstatement at the end of the period was made conditional upon his payment of the cost of the proceedings and desisting during that time from the repetition of improper conduct. He subsequently applied for readmission to the court alleging his good conduct during the period of suspension, but without showing the payment of the costs, and in support of his claim for reinstatement relied upon an act of the Legislature, passed after his suspension, which provided that the costs imposed upon him by the judgment were remitted by the state and authorizing him "henceforth to exercise all the rights and privileges of a duly licensed member of the bar." In declaring the statute unconstitutional, the court declared:

"We think the separation of sovereign power by which the Constitution assigned the legislative power to the Legislature and the judicial power to the courts, with the purpose of making each department supreme and independent in its respective field, accords to the Legislature the power of exacting of those who shall be admitted to the practice of the law such qualifications as the Legislature shall deem sufficient to protect the public from the evils and mischiefs resulting from incompetent and characterless attorneys, which qualifications so proscribed must be respected by the courts. The courts cannot and should not license any as attorneys at law who do not possess the qualifications deemed by the Legislature necessary for the protection of the public interest . . .

"While the Legislature may legislate with respect to the qualifications of attorneys, its power in that respect does not rest upon any power possessed by it to deal exclusively with the subject of the qualifications of attorneys, but is incidental merely to its general and unquestioned power to protect the public interest. When it does legislate fixing a standard of qualifications required of attorneys at law in order that public interests may be protected, such qualifications constitute only a minimum standard and limit the class from which the court must make its selection. Such legislative qualifications do not constitute the ultimate qualifications beyond which the court cannot go in fixing additional qualifications deemed necessary by the court for the proper administration of judicial functions. There is no legislative power to compel courts to admit to their bars persons deemed by them unfit to exercise the prerogatives of attorneys at law. The power of the court in this respect is limited only to the class which the Legislature has determined is necessary to conserve the public welfare."

REPORT ON DISCIPLINARY ENFORCEMENT

In upholding the inherent power of the court to determine who may be admitted to practice, subject to such reasonable and minimum restrictions as the Legislature may prescribe, we do no violence to article 7 of the Constitution, wherein is embodied the grant of the pardoning power to the Governor. This article was taken substantially from section 13 of article 5 of the Constitution of 1849, which was in force when this court declared in *Coben v. Wright*, 22 Cal. 293, that "the pardoning power does not extend to the reinstatement of an attorney excluded from the practice by law or the order of a Court." Under familiar principles, it will be presumed that the provision in the present Constitution having to do with the pardoning power was adopted with this construction in mind. To give to the "pardon statute" the effect for which petitioner contends would be to enlarge and extend the pardon beyond the constitutional grant thereof.

In re Lavine, 2 Cal. 2d 324 (1935)

In urging a contrary conclusion, petitioner relies upon the fact that the trial court acted under Penal Code, section 1203.4 to "set aside the verdict of guilty", after compliance with the conditions of his probation. The power of a trial court to place a defendant on probation and to set aside the verdict after a satisfactory completion of the probationary period is established by section 1203.4, which reads as follows: "Every defendant who has fulfilled the conditions of his probation for the entire period thereof . . . shall . . . be permitted by the court to withdraw his plea of guilty and enter a plea of not guilty; or if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and in either case the court shall thereupon dismiss the accusation or information against such a defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted . . . provided, that in any subsequent prosecution of such defendant for any other offense such prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed." A preliminary point may be noticed here. The statutory language purporting to release the defendant "from all penalties and disabilities resulting from the offense" is not to be interpreted as a legislative mandate that the order of disbarment of an attorney must be revoked where probation is granted. It is established by the decisions of this state that the legislature cannot infringe upon the judicial power of the court to discipline its own officers, and cannot vacate such a judicial order by legislative mandate. *In re Lavine* 2 Cal. 2d 324, 41 P. 2d 161. Any language of *In re Herron*, 217 Cal. 400, 19 P. 2d 4, which might be deemed to support a contrary conclusion is hereby disapproved . . . The "penalties and disabilities" to which the probation statute refers are those which it is within the power of the legislative branch of the government to release.

In re Phillips, 17 Cal. 2d 55 (1944)

The present status of the attorney in our judicial system has been a result of historical development which dates back for some seven centuries. Regardless of what may have happened in some jurisdictions to the rights and privileges of attorneys, the right to practice before the court as an officer of the court, still remains. While

doctors, plumbers, electricians, barbers, etc. may sell their time and skill to the public by virtue of their license from the state, the attorney alone has the right to set the judicial machinery in motion in behalf of another and to thus participate as an officer of the court in a judicial proceeding. This right springs from his status as an officer of the court. To properly function it is necessary that courts retain control of their officers. The attorney's part has developed until he now is a necessary and essential part of our judicial machinery. For the past 650 years this status has been considered to be a privilege to which has been annexed, in addition to many other obligations, the duty to defend the poor without compensation. We cannot logically hold that there is no privilege to which the duty to render gratuitous service may be annexed and yet uphold the right of the courts to continue to enforce the other duties and obligations. Both are supported by the argument from history, and both are justified only because they are held to be correlative to the privilege of practicing law.

In addition to this privilege, it has been consistently held that the right of the legislative branch of the government to regulate and control attorneys is subject to the inherent power of the court ultimately to control admission to practice and disbarment. While the language in *Higgins v. Burton*, 64 Utah 562, 232 P. 914, might indicate that we do not adhere to this rule, in a later case *In re Barclay*, 82 Utah 288, 24 P. 2d 302, 303, we stated: "It is quite generally held that the power is inherent in the proper court to discipline, suspend or disbar an attorney for misconduct, independent of any express provision of a statute conferring such authority." In support of this, we cited an earlier case, *In re Platz*, 42 Utah 439, 132 P. 390, 392, where we stated: "Nor can the Legislature limit the courts in their rights to determine the moral qualifications of their officers or prevent them from refusing to admit morally incompetent persons to practice, nor compel them to retain such upon the roll. . . . The courts, and not juries or legislators, must ultimately determine the qualifications and fitness of their officers." The majority of jurisdictions concede that the legislature might make reasonable regulation governing the admission and disbarment of attorneys in the exercise of their police powers and in aid of the court's powers, but they hold that the ultimate power of admission or disbarment is inherently with the courts.

Ruckenbrod v. Mullins, 102 Utah 548 (1943)

The constitutionality of statutes seeking to regulate attorneys frequently has been challenged in the course of litigation pertaining to judicially mandated integration of the bar into a single unit in which membership is a prerequisite to the right to practice. Without exception, the courts have held that the judiciary has the inherent power to integrate the bar without legislative authorization:

It has been held by every court to which the question has been presented that the court has power to integrate the bar and that the integration of the bar is a judicial and not a legislative function.

Integration of the Bar Case, 244 Wisc. 8 (1943)

The exclusive jurisdiction of the courts to supervise the bar was illustrated clearly in Oklahoma. The Oklahoma Legislature in 1929 passed a statute creating an integrated bar. It repealed the act in 1939. Although repeal expressed legislative intent, the Supreme Court of Oklahoma in *In re Integration of State Bar of Oklahoma*, 185 Okla. 505 (1939), created an integrated bar by court rule, relying on its inherent power to "control, regulate and integrate the members of the profession." The Supreme Court of Missouri similarly integrated its bar despite three successive defeats in the Missouri Legislature of a bill providing for integration. (See also, *Petition of Florida State Bar Association*, 40 So. 2d 902 (1949); *Petition for Integration of Bar of Minnesota*, 216 Minn. 195 (1943); and cases annotated at 151 A.L.R. 617 and 114 A.L.R. 161.)

The power of the court to supervise the conduct of attorneys without or despite contrary legislative action has been reaffirmed only recently. In *In re Member of the Bar*, 257 A. 2d 382 (1969), the Supreme Court of Delaware held that the establishment by court rule of a client security fund to which all Delaware attorneys must contribute was a valid exercise of its inherent power over the administration of justice and the conduct of its officers, and that it did not require legislative sanction. Similarly, in *Sams v. Olab*, 225 Ga. 497 (1970), the Supreme Court of Georgia held that a statute authorizing the court to integrate the bar under limited circumstances was, to the degree it sought to limit the court, unconstitutional. The court further held that the enabling legislation was unnecessary in any event, since the court had the inherent power to integrate the bar and could have done so without the act.

The Committee is convinced that the courts are a better vehicle for implementing needed reforms in disciplinary enforcement and that they have adequate power to do so. Consequently, the Committee strongly urges that its recommendations be submitted to the courts having disciplinary jurisdiction in each of the states rather than to the legislature.

SECTION III

36 PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT

Part A-Financing, Structure and Staff

Problem 1

Inadequate financing of disciplinary agencies for investigations and the conduct of proceedings.

DIMENSION

Lack of adequate financing is the most universal and significant problem in disciplinary enforcement. Even the most dedicated disciplinary agency cannot function effectively without adequate financial resources. Volunteer attorneys, upon whom reliance must be placed if there are no funds to hire staff, cannot devote the same time and attention to processing complaints as the full-time professional. Complicated matters cannot be investigated adequately by a volunteer attorney not professionally trained for that purpose. Even states such as California, which combine a volunteer system with a substantial professional staff, are considering seriously the desirability of converting to an exclusively professional staff. Questions of fact, the resolution of which requires expert testimony, must remain unanswered unless there are funds available to retain the expert.

In short, the availability of funds for personnel and expenses is a significant factor in distinguishing a disciplinary agency that

REPORT ON DISCIPLINARY ENFORCEMENT

performs only unavoidable tasks from one that does what ought to be done. State bar counsel from a midwestern state in which disciplinary enforcement has been revitalized over the past few years testified:

The fourth point I would like to make is that bar discipline must be adequately financed. The economy factors are such that you cannot expect to find and are not going to find very many lawyers as dedicated as the chairman . . . who will spend his money to hire secretarial help and to buy stationery in addition to taking his own dedicated time to do the work of the bar. If you're going to depend on those few dedicated souls like that to do it, it absolutely is not going to be done.

The money must be made available from bar sources or public sources, because the bar as a whole, the administration of justice as a whole, the public as a whole, benefit from these things.

Responses to the questionnaire circulated by this Committee make it quite evident that disciplinary agencies throughout the country are handicapped severely by the lack of financial resources available to them, and that they recognize this inadequacy as a major factor contributing to inadequate disciplinary enforcement. The problem is not one of disciplinary agency complacency but of finding means to obtain necessary financing. The urgency of the problem was capsuled neatly by the chairman of the inquiry division of a state bar association disciplinary agency.

My answer would be that whatever the costs, we have to find the money, because we can't afford not to do it.

RECOMMENDATION

Funding disciplinary agencies from private and public sources in amounts sufficient to permit adequate processing of complaints by professional staffs.

DISCUSSION

There are, of course, jurisdictions in which disciplinary agencies are better financed than in others. Analysis of the funding in these better jurisdictions discloses several sources, each of which appears to be an appropriate avenue to be explored in the jurisdictions handicapped by inadequate financing.

1. *Bar association funds*—The profession should recognize that the creation and maintenance of a disciplinary structure is one of its primary responsibilities. Many bar associations and state bars themselves provide funds for the operation of their disciplinary machinery. In states such as Florida, California, Oregon and Massachusetts, these funds are the sole support of the disciplinary

structure. Although even the integrated bars must struggle to provide funds, the problem is particularly acute in nonintegrated states where the bar associations are private organizations that receive dues only from their members rather than from every attorney admitted to practice. Typically, each county in a nonintegrated state has its own bar association, and it bears responsibility for disciplinary enforcement in that county. With the exception of a few large urban areas, the membership of the county bar associations is so small that funds for financing the operation of a disciplinary structure are not available. On the other hand, usually there are so few attorneys practicing in these counties that hiring a staff attorney, even if funds were available to do so, would not be justified. This does not necessarily mean that jurisdictions with limited resources and small bar membership are helpless. It simply means that they cannot be effective acting alone. For instance, funds available in one county bar association may, when combined with similar resources in neighboring counties, make it possible to retain a staff attorney who can establish an effective disciplinary structure for all the participating counties, none of which by itself has enough complaints to occupy a full-time attorney.

This kind of integration of disciplinary structures not only solves the financial problem but also may resolve the difficulties presented when members of the disciplinary agency in a jurisdiction with a small bar have to pass on the propriety of the conduct of other practitioners at that bar with whom they are socially as well as professionally acquainted.

There is, moreover, no reason or requirement that attorneys who are not members of bar associations in nonintegrated states should be exempt from bearing a share of the financial responsibility for disciplinary enforcement. Consideration should be given to periodic assessments of every member of the bar within the jurisdiction to fund the disciplinary structure. A mandatory assessment is made in Maryland to fund the state-wide client security fund, and a proposal to implement such assessment is pending in the State of New York.

2. *Public funds*—One of the principal purposes of attorney discipline is to protect the public by removing the wrongdoer, temporarily or permanently. There is a clear public interest, therefore, in providing adequate resources for effective disciplinary enforcement. Recognizing this, some jurisdictions have

provided funds from general public revenues for their disciplinary agencies.

For example, in South Carolina, the legislature annually appropriates funds for disciplinary enforcement. New York State provides by statute that the cost of the services of the attorney representing the bar and his disbursements in any matter requiring a hearing before a disciplinary agency may be made a charge against the county having jurisdiction of the complaint. In the First Judicial Department in New York City, this provision has made it possible for the city and The Association of the Bar of the City of New York to divide evenly the cost of operating the entire, fully staffed disciplinary structure.

Not every state legislature has been as concerned with effective disciplinary enforcement as those of South Carolina and New York. In fact, some have exhibited reluctance to implement any reforms designed to improve the disciplinary process. While a request to the legislature is the most direct approach for obtaining public funds, since it controls the "purse strings", alternative approaches must be considered in the event the legislature does not act favorably.

Control and supervision of attorneys historically has been one of the major responsibilities of the courts. Accordingly, even if a state legislature should refuse to appropriate funds for disciplinary enforcement directly, it may be possible to obtain the funds from the court having disciplinary jurisdiction. This is done in Ohio, for example. It is true, of course, that the funds available to the court must be appropriated by the same state legislature. However, it is much less likely that the court's budgetary request, in which it includes the amount needed to fund the disciplinary structure, will be as easily rejected by the legislature.

Public officials responsible for passing on requests to finance a disciplinary structure would do well to consider the effect on the public treasury if the profession relinquished the responsibility to police itself, a result that seems inevitable if financing adequate to establish an enforcement structure commanding public confidence is not made available soon. Disciplinary enforcement would then become the responsibility of a public agency that would itself have to bear the full cost of staff and be required to pay the salaries of replacements for the volunteers who now serve. The refusal to make available some public funds today to help support the

existing disciplinary structure is likely to be a short-sighted economy.

3. *Assessment of costs against respondent-attorney*—In a number of jurisdictions, such as Florida, the costs incurred in the course of a disciplinary proceeding are assessed against the respondent-attorney if the charges are sustained and discipline imposed. This method of funding, of course, cannot reimburse the disciplinary agency for the full cost of its operation, since costs are assessed only in those matters that result in formal discipline, a numerically small proportion of all matters considered.

The compulsion that prompts the respondent-attorney to pay the costs assessed against him is the fact that payment is made a condition precedent to the filing of a motion for reinstatement. A former member of a state bar board of governors explained:

In a poor state like ours, these disciplinary proceedings are very expensive. We were able to get a rule from the supreme court to allow the court to assess the cost of the disciplinary proceeding against the attorney who is found guilty. If we can't find any assets for judgment on these costs, there isn't much we can do. But if he applies for reinstatement, we can collect the costs on application for reinstatement.

This seems to us to put an undesirable premium on the disciplined attorney's financial ability and tends to disqualify an attorney who has no independent source of income from seeking reinstatement, although he may be qualified to resume the practice of law. We recommend that disciplinary agencies seek necessary funding from the bar and public sources rather than by assessment of costs against respondent-attorneys.

It is, of course, unlikely that either of these sources can itself be used to fund an ideal disciplinary structure fully. It probably will be necessary to obtain funds from each, a pooling of resources that may be highly desirable. A disciplinary structure funded by monies provided by both professional and public sources accurately reflects the dual nature of disciplinary enforcement.

Problem 2

Local and fragmented nature of the disciplinary structure.

DIMENSION

In many jurisdictions the members of the disciplinary agency are selected from and function within their county, Congressional or judicial districts. The lawyer population in these narrow geographical areas is often so small that its members know one another. Consequently, the members of the disciplinary agency are required to pass judgment on the conduct of attorneys with whom they are personally acquainted. In some jurisdictions disciplinary authority is vested in local trial courts whose judges are required to decide whether to impose discipline on attorneys with whom they are socially, professionally or politically acquainted.

Decentralized disciplinary structures complicate the already difficult task of administering effective professional discipline. Neither the disciplinary agency member nor the judge who frequently works and meets socially with an attorney can judge him objectively. The president of a state bar with an attorney population of 2,000 explained:

Necessarily, there is a personal relationship in the state among the members of the bar, and between the members of the bar and the members of our courts. We know each other by our first names, and it in itself brings a sense of reluctance on the part of those people charged with discipline to administer it.

The chairman of a state bar association disciplinary committee in a state with many small county bar associations testified:

The intimacy, the small size and the lack of organization and leadership in many of our small county bars constantly hobble effective procedures. Also there is the back-scratching phenomenon. For example, some of our bar associations have as few as a half dozen members. For them to discipline one of their own is virtually an impossible task.

Even if objectivity were possible under these circumstances, the public might suspect favoritism or even impropriety when charges are not sustained or discipline short of disbarment is imposed.

RECOMMENDATION

Statewide centralization of disciplinary jurisdiction under the ultimate control of the highest court of the state.

DISCUSSION

Canon 9 of the recently adopted Code of Professional

Responsibility and Canon 4 of the Canons of Judicial Ethics recognize the importance of avoiding the appearance of impropriety as well as the fact of impropriety. This concept should be a critical concern in structuring the disciplinary process.

An overdecentralized structure, which requires members of a local legal community to discipline each other, may result in reluctance by disciplinary agencies to proceed against certain prominent lawyers or law firms and to submit serious cases to the court having disciplinary jurisdiction, and reluctance on the part of the court to impose substantial discipline. A member of a state disciplinary commission testified:

We have found in many instances that a complaint might be against an attorney in the rural areas where the attorneys are close, and it could be a serious embezzlement of funds, and a member of the disciplinary agency might go to his friend and say, "Look, Joe, why don't you take care of this before it goes any further." We never hear of it then.

The president of a large, nonintegrated state bar association explained:

Until they are pushed, many of the smaller city and county bar associations will take no action.

The chairman of a state bar disciplinary committee in an integrated jurisdiction was more specific:

We have a case pending against a prominent firm in one of the largest cities The attorneys are well known throughout the state and to members of the council. The grievance committee recommended action but the council held up action on it and referred it to the ethics committee with the possibility of rewriting the ethics opinion so that this particular firm might not be called.

It is a problem. How we are going to handle it, I don't know. At the last meeting of the grievance committee and at the meeting of the council, the solicitor . . . had a complaint filed against him and they took it away from the grievance committee and the council acted on it and passed it over because the man was well known in that particular area of the state.

Even if none of these possibilities eventuates, close professional, personal and political relationships among disciplinary agency members, judges and attorneys accused of misconduct and their counsel cast a shadow of suspicion over every disciplinary proceeding in which charges are not sustained or relatively minor discipline is imposed. The integrity of the disciplinary process in the eyes of the public is undermined.

A decentralized structure, utilizing a multiplicity of disciplinary agencies and courts, also produces a substantial lack of

REPORT ON DISCIPLINARY ENFORCEMENT

uniformity in discipline imposed, which is aggravated by an absence of intrastate coordination. It is significant to note that this problem may arise regardless of bar structure. Thus, the chairman of a state bar disciplinary committee in an integrated jurisdiction told us:

We do have a need for a greater coordination between our state bar complaints committee and the various local bars over the state. I would say that we have, oh, six to ten local bars that have very active disciplinary committees and we don't have any machinery or procedure at this time to obtain the results of what they do during the year.

The president of a state bar in one of our largest states agreed:

We have a loose knit organization of approximately 28 grievance committees, I believe, and they are autonomous. About all that the president of the state bar can do is to have the privilege of furnishing a little financial help when we can. The president appoints the board of directors, and they appoint the members, and other than that they are on their own. And, of course, we get different and varied results out of the same type of case.

The point was further illustrated in the following colloquy between a member of this Committee and the chairman of a local disciplinary agency:

Question: As I understand it, you have four grievance committees operating [in the locale]. How do you get any coordination among the variety of discipline that is administered by those four grievance committees?

Answer: There is no coordination as such, other than the indoctrination session that the committees usually have or from the board of directors who appoint these committees, who outline to them what the committees have done in the past, their procedures, and one thing and another. But there is no equalization of justice among them. They operate completely independently in what they do in the way of disciplinary action.

Question: Two culprits could get different discipline depending on the draw of the grievance committee to which the complaint was referred?

Answer: Yes, sir. This is a problem with the courts, as well, if you know, but certainly that is true.

Centralization of the disciplinary structure in states where there is now total decentralization is, therefore, essential.

A disciplinary system centralized on a statewide basis, with jurisdiction vested solely in the state's highest court and a single disciplinary agency with members distributed throughout the state provides the greatest degree of structural impartiality. Close personal relationships between accused attorneys and those who are to judge the charges against them are more likely to be

avoided. A centralized disciplinary structure, moreover, provides uniformity in disciplinary enforcement throughout the state since only a single court and a single disciplinary agency are involved in the process.

Complete centralization of the disciplinary structure within a state, however, may not always be feasible. In states with large attorney populations, one disciplinary agency located at a single site cannot cope adequately with the number of complaints submitted, much less engage in necessary investigations initiated without complaint. The problem of delay, which now plagues many disciplinary jurisdictions, would be exacerbated.

There have been attempts in the past to strike a balance between too much decentralization in a disciplinary system and inefficient overcentralization. One of the best known of these efforts has been made in a midwestern state with a substantial lawyer population. A single statewide disciplinary commission has been created there to process all matters warranting court action, and the supreme court of the state has assumed exclusive disciplinary jurisdiction. Unfortunately, complaints still are usually processed initially at the local disciplinary agency level, from which they are referred to the statewide disciplinary commission if the local agency concludes that such action is warranted. Thus, in its initial stages, a complaint is subject to the potential consequences of close professional, personal and political relationships between the accused attorney and the members of the local disciplinary agency who initially investigate his conduct. By permitting the local disciplinary agencies to maintain a role in the initial handling and disposition of complaints, moreover, this state's system hampers uniform discipline by permitting local criteria to determine whether the specific misconduct warrants referral to the statewide disciplinary commission for court action. The chairman of one of these local disciplinary agencies explained:

Now, this, I think, is probably the best system, if I may say so, that I have heard so far. It eliminates a lot of the problems that arise in trying to enforce discipline, as far as the supreme court is concerned. It does not, of course, eliminate the problems that I face as the chairman of our local committee. Because we still are under tremendous pressures from the local bar in trying to bring charges against certain people.

Certain people—as you well know, and everybody recognizes—are very popular and certain people are very influential and we are subject to the pressures put upon us either to go after somebody or to lay off of him.

REPORT ON DISCIPLINARY ENFORCEMENT

These considerations lead us to recommend centralization of discipline within each state on the widest feasible level. As a first step, disciplinary jurisdiction should be vested in the highest court in each state. A state bar counsel from a state with a relatively effective disciplinary system testified:

But, again, to summarize what I have seen of bar discipline, I would say that the most important thing is that the highest court in the jurisdiction must be intimately involved. I would say the problem cannot be adequately solved . . . in any . . . state until the judges who control admission and discipline are made aware of the problem and become interested in solving it.

Vesting exclusive disciplinary jurisdiction in the state's highest court will remove or reduce personal relationships between the court and attorneys to be disciplined, assure uniformity of court imposed discipline and should produce greater uniformity in practice and procedure. The chairman of a local disciplinary agency outlined the advantages of removing disciplinary authority from local courts and vesting it in a disciplinary commission answerable directly to the state's highest court:

The thinking behind establishing this [supreme court] board was that they wanted to get away from the local influence that you have in the common pleas court. The bar politics—whether or not the man was well liked or well disliked. We thought we could achieve more uniformity of discipline, and this was a real problem. In one part of the state, embezzlement would be grounds for disbarment, and in another part of the state, if the accused got a private reprimand, it might be considered a real accomplishment.

We further recommend that disciplinary agencies within a state be centralized into a single unit. Where attorney population requires, the staff and inquiry and hearing committees ("field units"), under the supervision of the central agency, should be assigned to appropriate population centers in the state. New York, the state with the largest attorney population, now divides the disciplinary jurisdiction of its courts into four judicial departments. Investigation and prosecution can be handled readily by one field unit in each department. The New York State Bar Association received the American Bar Association's Award of Merit in 1969 for formulating and implementing a new centralized disciplinary structure in the Third Department. New York's experience indicates that no more than four field units would be required even in large states with substantial attorney populations.

A state bar counsel explained the results of such a centralized structure:

You do not have the situation where the people in one community are handled by one set of standards and people in another community are handled by another.

Centralization of the disciplinary structure also will facilitate the availability of additional staff and financial resources for effective enforcement. This is the inevitable result of merging existing local disciplinary jurisdictions that separately have inadequate resources to hire professional staff. A local bar association summarized the advantages of centralizing the disciplinary structure in its response to the questionnaire circulated by this Committee:

Again, there are no fixed rules for bringing a disbarment action in our jurisdiction. The . . . state bar association should be charged with this responsibility. Such office would have the time, the talent, and personnel to prosecute the proceedings. Also, the proceedings would be on a nonpersonal basis, if brought by the . . . state bar association. A local grievance committee is most reluctant to bring a disbarment proceeding because the defendant is usually known to the members of the local grievance committee on a first-name basis.

It should be noted that the centralization of the disciplinary structure we advocate does not necessarily depend on the structure of the bar itself. For example, Missouri successfully centralized its disciplinary structure 11 years before its bar was integrated.

Problem 3

Cumbersome structures that result in an inordinate time gap between the inception and conclusion of disciplinary proceedings.

DIMENSION

The survey of disciplinary agencies throughout the United States conducted by this Committee discloses that the time gap between receipt of the complaint and the entry of a court order imposing discipline varies from several months to more than five years. In some instances delay is caused by the complexity of the underlying matter and the difficulty of obtaining relevant evidence. Too often, however, the disciplinary structure itself is a major cause of delay. The chairman of a state bar association disciplinary agency from one of the midwestern states testified:

I mentioned five areas of concern. One . . . is a rule which has a kind of built-in delay mechanism. We have to go through a series of steps, committees, probable cause hearings, to get to the point of a formal action in the supreme court, aimed at an effective discipline. I can tell you that the people here and the profession . . . are concerned about the fact, and are studying it and trying to resolve it.

Inordinate delay not only unnecessarily exposes the public to the malefactor but may result in harm to the innocent attorney as well. A state bar counsel explained:

I continue to remind our committee that they do a grave injustice to the accused lawyer who is innocent by not processing that complaint, having a hearing on it, if one be necessary, and clearing his name. I warn them that one of these days they're going to find an outstanding complaint of long duration still pending when a very fine, ethical lawyer receives an appointment to the federal bench or some federal agency, and the investigators come around to determine if there's any complaint pending against that man.

It is significant to note that most of the disciplinary agencies surveyed are themselves dissatisfied with their cumbersome structures and recognize that inordinate delay is a major problem in effective disciplinary enforcement. This attitude is illustrated in the following statement by counsel to a large urban disciplinary agency:

The delay between receipt of a complaint and final imposition of discipline is a disservice to effective enforcement. It permits the violator to continue to practice, and in some instances to continue his misconduct, and undermines the confidence of the public in the bar's determination to enforce the canons of ethics.

RECOMMENDATION

Reduction of procedural stages within the disciplinary process;

scheduling of firm dates for hearings with adequate notice to the respondent-attorney in order to minimize adjournments; and court rules affording disciplinary proceedings priority.

DISCUSSION

Much of the delay inherent in the disciplinary process results from reliance on volunteer practitioners to process, investigate and prosecute complaints of attorney misconduct. The consequences of a disciplinary system that must rely on the "spare time" of volunteers because of lack of financing necessary to hire a full-time staff are discussed separately in other portions of this report.

In many jurisdictions the disciplinary structure is itself a principal cause of inordinate delay. It is not unusual to find jurisdictions with procedures involving six or seven stages, including three adversary hearings, before final action on a complaint can be taken. A member of a local disciplinary agency in a small integrated jurisdiction illustrated an instance of needless duplication:

The present rules require that if a charge is being investigated against a member, the member shall be allowed the opportunity to be heard before the filing of a formal complaint. That is, in the course of the investigation it is mandatory that either there be an informal hearing of the member before the local administrative committee, or the examiner must go over the matter with the accused attorney. We feel that this has caused some delays and has caused problems in another way, and that is if we have a serious matter in which an attorney is going to be formally charged and we have an informal hearing before the local administrative committee, then the committee makes a determination that this charge does have merit and should go forward. Then it comes back for hearing again before the same committee. It seems to be a bad situation in that the committee has already made a preliminary determination that there has been a grievance committed.

In many nonintegrated jurisdictions, complaints are processed initially by local disciplinary agencies, which are authorized to conduct hearings in furtherance of their investigation. These local agencies submit their findings and recommendations to the governing body of the local bar association for approval. The complaint may then be forwarded by the local committee to the state bar association disciplinary agency or a state disciplinary commission appointed by the court having disciplinary jurisdiction. This agency may investigate the matter further and also is authorized to conduct a hearing. The president of a state bar association noted the inevitable delay that results:

REPORT ON DISCIPLINARY ENFORCEMENT

There have been instances of dual investigation in the past. There have been instances of the bar association committee taking many months to complete its investigation, only to find that a very serious charge was involved. Feeling it had no jurisdiction, it referred the matter to the supreme court committee, which then undertook the same investigation with different investigators. This kind of a thing breeds inefficiency. We hope it is being solved.

The state bar association agency or the disciplinary commission may then institute a formal proceeding in the court having disciplinary jurisdiction. In some jurisdictions this court must first decide whether the complaint should be formally filed before appointing its own referee or judge to hold a further hearing. Thereafter, the referee or judge files his report and recommendations, on the basis of which the court finally disposes of the case after affording the parties an opportunity to file briefs and to present oral argument.

A substantially similar multi-stage procedure is followed in many integrated bar states. The complaint is first investigated by an inquiry committee, which is authorized to conduct a hearing. The inquiry committee then files a report and recommendations with the governing board of the state bar for approval. The board authorizes a formal proceeding and appoints a trial committee and the prosecutors. A formal hearing is then held by the trial committee, which thereafter files its report and recommendations with the governing board of the state bar for approval. Frequently, the parties to the disciplinary proceeding are permitted to file briefs with the governing board and to appear personally for oral argument at this stage. If the board decides to proceed further, its own report and recommendations are prepared and filed in the court having disciplinary jurisdiction, together with the record of the formal hearing. The court then resolves the proceeding after affording the parties an opportunity to file briefs and present oral argument.

The multiple stages encompassed in these procedures far exceed the requirements of due process. Even an individual charged with murder in the first degree and subject to a possible death sentence is entitled to no more than indictment by a grand jury, limited discovery procedures and one trial. This point was forcefully made by a state bar counsel:

I mentioned that some committees insist on a full-scale adversary proceeding. Others do not. They hold that it is an ex parte grand jury type of thing. Now, those who insist on the full scale adversary

proceeding say, "Well, we've got to be aware of due process." They claim that you are not affording the accused lawyer due process unless he is permitted to cross-examine the accuser and the accuser's witnesses, and you must have a full-dress adversary proceeding or he is not afforded due process.

Well, to me, the obvious answer is that then we do not have due process in any criminal case . . . where the accused is indicted by a grand jury. There isn't any adversary proceeding before a grand jury.

I don't think the courts would say that he is not afforded due process simply because he is not afforded an adversary proceeding before the grievance committee.

Thus, there does not appear to be any constitutional bar to the streamlining of disciplinary procedures necessary to minimize delay.

We have already discussed the desirability of a single statewide disciplinary agency. Centralization avoids the repetitive investigative stages that now cause the transfer of complaints from one disciplinary agency to another. One investigation, if properly conducted, is sufficient.

While most jurisdictions authorize an adversary hearing at the investigative stage, this is not always possible. Some investigations relate to misconduct of a complex or continuing nature. This possible misconduct is more efficiently investigated by ex parte proceedings similar to a grand jury investigation. Disciplinary agencies should be given discretion to determine whether an adversary hearing or an ex parte investigation is more appropriate. That determination, however, will affect the procedure to be followed if a formal proceeding is instituted later.

If there has been an adversary hearing at the investigative stage, there is no necessity for pretrial discovery, since the parties will have had each other's case disclosed to them in the course of the hearing. If, on the other hand, the investigative stage is conducted ex parte, there will have been no disclosure, and pretrial discovery should be available following the filing of charges and prior to the formal hearing. Implementation of this recommendation, therefore, affords the parties reasonable opportunity to obtain necessary information concerning the nature and substance of their adversary's case while limiting the number of hearings necessary to reach a final determination, thereby significantly reducing delay.

Repetitive review by governing bodies also should be avoided. This can be accomplished by limiting review to the stage of the proceeding (depending on the procedure that exists in the

jurisdiction) immediately prior to referral to the court having disciplinary jurisdiction. This is the present practice in some jurisdictions, usually nonintegrated states, where the formal hearing is held by the court itself or by a court-appointed referee. In those jurisdictions, the matter is reviewed by the governing body at the conclusion of the investigative stage prior to the filing of charges in the court. In most integrated jurisdictions, however, the disciplinary agency retains jurisdiction over complaints both in the investigative and formal hearing stages, and the court is not even aware of the proceeding until the formal hearings have been concluded by a recommendation that court discipline be imposed. Some of these jurisdictions provide for review by the governing body at the conclusion of the investigative stage as well as at the conclusion of the formal hearing. This dual review by the governing body is cumbersome, unnecessary and possibly unconstitutional. A state bar representative made this comment in citing delay as one of the major problems:

An antiquated review system, which finds the matter being investigated, then referred to the commission, then referred for disciplinary action, then back to the commission for recommendation and then to the supreme court for action. The number of referrals back and forth alone makes it slow and cumbersome.

The governing bodies of bar associations, particularly those in jurisdictions with large geographical areas and relatively small attorney populations, meet only several times a year. Consequently, whenever review by that governing body is a necessary stage in the disciplinary process, delay ensues. We recognize that one review probably is desirable in order for the governing body properly to carry out its responsibility of supervising the work of the disciplinary agency. This, however, can be accomplished readily by a single review at the conclusion of the disciplinary agency process. The additional delay engendered by intermediate review in those states in which the bar association retains jurisdiction over the subsequent formal hearing appears to be unwarranted.

The practice of permitting a review by the governing body at the conclusion of both the investigatory and formal hearing stages may well be subject to attack as a violation of due process. It can be argued that if the governing body has reviewed a disciplinary proceeding at the conclusion of the investigative stage and has determined that formal charges should be prosecuted, then the subsequent action by that same governing body in appointing a

specific trial committee to conduct a formal hearing into the charges it has itself authorized, in designating the specific prosecutors to present the charges at the formal hearing and in ultimately reviewing and passing on the findings of the trial committee, results in an unconstitutional blending of the roles of prosecutor, judge and jury.

Abolition of intermediate review by the governing body will necessitate finding another method of appointing hearing committees and attorneys to represent the bar. If a professional staff is hired, as we recommend elsewhere, the necessity of finding attorneys to represent the bar will be solved. In the absence of a professional staff, either the governing body or the court having disciplinary jurisdiction can appoint a panel of attorneys to whom the complaints may be assigned in rotation. Similarly, the governing body or a court having disciplinary jurisdiction can appoint standing hearing panels to whom formal proceedings are assigned in rotation.

The separation of the prosecutorial and judicial functions can be clarified even further and the governing board relieved of the time-consuming burdens of reviewing disciplinary proceedings by the creation of a statewide disciplinary board whose sole function is to review the trial record and recommendation of the hearing panels in all formal disciplinary proceedings. Such a board was created recently in California. Its function was described to us by the president of the state bar:

Up until January 1, 1966, the board of governors, 15 in number, sat as the major hearing body before the record was transmitted to the supreme court for its final action. Due largely to the increased demands upon the board of governors, in 1966 there were created two disciplinary boards, each of eight members, each statewide in composition, and each sitting alternatively north or south, so there could be as uniform justice as possible administered by those boards. The system, we feel, worked well; but since no two tribunals could ever pass upon a similar situation with equal uniformity, it was decided this year to convert the system, to have one fifteen man board that would also sit statewide. And that has been in effect . . . since January 1, 1968.

As this comment indicates, the establishment of a statewide disciplinary board also promotes uniformity of discipline on a statewide basis. Other advantages likely to result from the establishment of such a disciplinary board were summarized by a former member of the governing body of a state bar in a jurisdiction in which such a board had just been established:

REPORT ON DISCIPLINARY ENFORCEMENT

They will supplant the board of governors in making recommendations to the supreme court. We hope that this system will do these things: first, relieve the board of governors of this time-consuming factor, and second, we believe with that sort of consistency, an appointed board, we might get an analysis of the transcripts, better opinions, and possibly cut down some of the supreme court's time reviewing these and thus speed up the process.

Delay can be reduced further by limiting the size of hearing panels. In some jurisdictions, New York City being an example, hearing panels are composed of eight or more members of the disciplinary agency. It is often difficult to find a mutually acceptable time for this many active private practitioners to meet together for disciplinary hearings, and adjournments occasionally are necessary because a mutually acceptable time cannot be found. Even if quorum requirements are lowered so that it is possible to hold a hearing without all members of the panel present, it does not reflect well on the profession in the eyes of the complainant, the witnesses or the respondent-attorney if less than a full hearing panel is present. California has found that three-man hearing panels work well and efficiently, and we recommend the use of such panels, composed of a third-year member as chairman, one second-year member and one first-year member.

Delay can be reduced further by the adoption of stringent measures to insure the prompt scheduling of hearings. There must be an immediate end to the practice of scheduling hearings through the mutual agreement of the hearing panel, the attorney representing the bar, the respondent-attorney, the respondent-attorney's counsel and witnesses. A time convenient to every member of such a large group is almost impossible to find. The chairman of the inquiry committee of a local disciplinary agency in a large urban area described the results of even attempting to schedule hearings in this fashion:

In order to get, because of the requirements of time on everyone, two members of the committee of inquiry who are the prosecutors, the respondent who is a busy practicing lawyer, respondent's counsel and four or five or six members of the grievance [committee] together, sometimes we would talk at the end of one hearing and we would have about ten dates, and finally we might, we might, be able to get one date and it might be four months hence.

A far more effective procedure is to schedule regular meetings of the inquiry and hearing panels at such intervals as the experience of the disciplinary agency indicates are necessary, e.g., Thursday of each week, every second Thursday, or the third

Thursday of each month. Charges should then be assigned to the panel sufficiently well in advance so that adequate notice may be given to all concerned. The notice to the respondent-attorney should advise him that he is entitled to retain counsel, that he is being given notice of the charges sufficiently well in advance of the hearing to enable him to do so and that, consequently, no request for an adjournment will be granted. Then requests for adjournments should be denied steadfastly, except when unforeseen situations of an emergency nature arise. A similar practice of adequate notice and refusal of requests for adjournments should be instituted with respect to hearings conducted by referees appointed by the court having disciplinary jurisdiction.

It should be noted in passing that such notice also is likely to increase the number of respondents who obtain counsel to represent them. This will serve to reduce delay, for disciplinary proceedings usually are expedited when both sides are represented by counsel.

Court-ordered hearings frequently are delayed because of the appointment of an inexperienced referee unfamiliar with the applicable procedure and substantive law. This delay can be reduced significantly if the court having disciplinary jurisdiction limits the selection of referees to either retired judges or a panel of practitioners experienced in the disciplinary field. The president of a large integrated state bar testified:

The suggestion of using retired judges for this kind of employment is certainly good. I have heard discussions among the committee that it has been studying this matter of having a highly select and small group of referees who would be more experienced in handling these cases and not try to spread it out quite as broadly as we have now.

Finally, there are occasions when the court having disciplinary jurisdiction is itself responsible for unwarranted delay in the disposition of disciplinary proceedings. It is not unusual to find that after the conclusion of the formal hearing and the submission of the findings and recommendations of the trier of fact, the proceeding remains pending before the court without decision for many months and, on some occasions, even years. The president of a state bar gave us an aggravated illustration of the problem:

We are concerned by the delay in our administrative procedures, yes. We accept responsibility for these delays, but we are also concerned by the delay in disposition of matters once lodged with our court. We sent a recommendation to the court in December of 1966

REPORT ON DISCIPLINARY ENFORCEMENT

to discipline a man who stole clients' funds and the matter is still [September, 1968] pending and he is still practicing law.

A member of a local disciplinary agency indicated similar delays exist in his jurisdiction:

There have been cases where the charges were aggravated, where the committee has recommended disbarment, and then there has been a very long length of time, sometimes a year or more, before the court comes down with an opinion. In practically all cases in recent years the opinion will generally affirm and adopt the recommendations of the committee, but in the meantime the lawyer will have practiced for anywhere from six months or a year or a year and a half after the proceedings were initially instituted and will eventually be disbarred.

The question is should he have been practicing during that period of time? I think this is a very bad situation.

Often this delay is the normal result of the congestion with which many of our courts are faced. Whatever the reason, however, these delays must be reduced because the prompt disposition of a disciplinary proceeding involves a substantial public interest. Consequently, we recommend that disciplinary proceedings be given priority by the court having disciplinary jurisdiction so that a final determination is made no later than 30 days following final argument by the parties. We are in full accord with the following comment made by the first vice president of a state bar:

There is, in my opinion, no excuse for delays once a recommendation of disbarment or suspension may be made by the board of governors to the supreme court. There is no excuse for the court sitting on these matters for a year or two years. I think by simple rule they could be given top priority and disposed of rather quickly. We don't have this many matters taken to the supreme court. But when a recommendation of disbarment has been made based on the fact that a lawyer has been stealing, there is no justification for this matter going behind all other cases that the supreme court has yet to hear.

Problem 4

Ineffective rotation of the membership of disciplinary agencies.

DIMENSION

Some jurisdictions do not require any specific rotation in the membership of their disciplinary agencies, and in some instances members have served for many years. Without periodic rotation, the number of lawyers who can participate in the disciplinary process is substantially restricted. This may result in perpetuation of outmoded practices and procedures and tends to make the agency less representative of the bar whose conduct it supervises. In other jurisdictions, disciplinary agency members are rotated so frequently (in some instances, the full committee is appointed for only one year) that it is difficult to develop expertise or to provide continuity of policy.

RECOMMENDATION

Disciplinary agency members should be appointed for three-year terms of service, with no member to be eligible to serve for more than two consecutive terms. In addition, appointments to a disciplinary agency should be staggered so that one third of the membership is rotated annually.

DISCUSSION

Proper rotation of disciplinary agency membership is a significant factor in effective enforcement. While frequent rotation may result in a lack of expertise, infrequent rotation often results in rigidity.

Too Frequent Rotation

The enforcement of professional ethical standards requires familiarity with a specialized subject of increasing substantive dimensions. The newly appointed disciplinary agency member often has had no occasion to concern himself with the ethical standards of the profession beyond passing references in the course of his legal education (which may be some years removed at the time of his appointment) and instances in his own practice when he has faced an ethical problem. That is not to say that the novice disciplinary agency member is unaware of acts that violate generally accepted moral codes, such as conversion and perjury. His lack of awareness generally relates to the standards peculiar to the profession, such as the prohibition against representing

conflicting interests, the prohibition against disclosing confidential communications and the prohibition against aiding the unauthorized practice of the law.

Before the newly appointed member can effectively participate in the work of the disciplinary agency, he usually must first devote substantial time to learning the standards that are to be applied in assessing the complaints submitted to him for investigation and disposition. A principal source from which the new member acquires the necessary knowledge to perform tasks assigned to him is the older, more experienced member. In order to make use of that source, however, the terms of office of both the new member and the older member must overlap sufficiently so that there is adequate time for the educational process to take place. Too frequent rotation of agency members makes that impossible. The chairman of a county disciplinary agency in one of the New England states explained what happens when membership is not carefully rotated:

When I first went on the grievance committee, it so happened that two of the other members went off, two new ones were appointed, and the third only remained for a short period of time. So here we were three neophytes confronted with grievance procedure, and we had a lot to learn.

Where the entire membership of a disciplinary agency is appointed for a term of one year, as is the practice in Montana and New Mexico, for example, all its members are new, with the exception of those who may have served on prior occasions, and there are no experienced members upon whom the others can rely for guidance. When members serve for only one year, as a member of a state bar disciplinary agency from one of the less populated midwestern states told us, fundamental agency policy is constantly in flux:

Provided by statute, there is a committee appointed by the president of the state bar annually. That leaves the possibility of having a whole new committee appointed in any given year, with no continuity. There is always the basic problem of what the position of the committee should be and what its primary responsibility is.

Appointment of disciplinary agency members for a term of two years, as is done in Kentucky, is somewhat more desirable. Some measure of continuity is provided since a two-year term usually involves appointment of one half of the committee each year. Two-year terms also provide an opportunity for the newly appointed attorney to make use of the expertise he has gained in

his first year during his second year. However, in the course of that second year, the new attorney must not only begin to apply the knowledge he has gained but must also serve as the experienced member responsible for educating the new members serving their first year. One year's experience is often inadequate to qualify the member to carry on this dual responsibility effectively.

Appointment of disciplinary agencies for a term of three years, with one third of the membership rotated annually, as is the practice in Idaho, Alaska and North Carolina, presents a better alternative. It affords the newly appointed attorney one year to gain some expertise, a second year to apply it and the third year to exercise his judgment, molded by experience, in directing the agency and training its new members.

Reliance on untrained disciplinary agency members because of too frequent changes in membership may result in a number of problems stemming from lack of expertise, particularly in those jurisdictions which do not maintain a professional staff to whom the agency member may turn for advice and assistance:

1. *Nonuniform standards of enforcement*—Without adequate opportunity for training and in the absence of a professional staff, each member of the disciplinary agency must apply his own standards and technique to the investigation of complaints assigned to him. Disposition of a particular complaint, therefore, may depend largely on the member of the agency to whom it is assigned rather than on its substantive merit.

2. *Increased delay in disposition*—The inordinate delay between the filing of a complaint and its final disposition, which exists in many jurisdictions, is increased by reliance on the untrained disciplinary agency member, for he must devote substantial time to familiarizing himself with the applicable ethical standard and the proper method to use in investigating the complaint.

3. *Inability to conduct intensive investigation*—The disciplinary agency member is a volunteer whose principal responsibility is to his private practice. Where a substantial portion of his already limited time must be devoted to learning the applicable ethical standards, he may find himself unable to cope adequately with those matters requiring independent investigation.

4. *Inadequate recordkeeping*—We already have averted to the lack of continuity that follows too frequent rotation in discipli-

nary agency membership. The consequent difficulties are aggravated if no adequate recordkeeping system exists from which the newly appointed committee may accurately determine what its predecessor has done. The new disciplinary agency member, untrained in the standards which he is to enforce, struggling to carry out the investigative responsibilities assigned to him, is not likely to concern himself with maintaining adequate records for use by his successors.

Too Infrequent Rotation

In some jurisdictions, such as Nebraska and the District of Columbia, there is no requirement concerning rotation of disciplinary agency membership and no limit on the number of successive terms any member may serve. The potential consequences of such a policy were outlined by the president of a small state bar:

The members of what we call our administrative committee, which are the hearing committees, are appointed to serve at the pleasure of the supreme court. And as a practical matter, that means that their terms are effectively limited only by their life expectancy. This, of course, breeds a sense of complacency, a feeling of proprietary relationship between the chairman of the committee and the duties with which he is charged. We feel that there should be provision for staggered terms of members of these committees, relatively short, and that the appointing authority should be ruthless in not reappointing people who have failed to discharge their responsibilities.

Some provision for reappointment of effective members is, of course, highly desirable. When, however, the power of reappointment is exercised virtually in perpetuity, serious impediments to effective disciplinary enforcement may result:

1. *Perpetuation of existing policies*—We have pointed out that periodic appointment of novice disciplinary agency members presents difficulties stemming from the new member's lack of expertise and the resulting necessity for "on-the-job" training. On the other hand, periodic appointment of new members has certain advantages.

The chairman of a state bar association observed that each time a new member is appointed to a disciplinary agency its procedures are seen through new eyes and reevaluated:

I would also stress . . . my personal belief that while it is good to have some people with some years standing—I have about six or seven years on the state level—I think you have got to get a turnover, rather than just the same people.

It is good to have experience, but by the same token it is good to

evolve this procedure. You get different attitudes, true, but I do not think you get stale, either. And whatever pattern you fall into, you can re-examine it.

On that basis, I would suggest that the committee think about changing the personnel, if possible. You need continuity but by the same token you have to have a new approach.

This process of re-evaluation results in periodic improvement as less effective approaches are replaced. When the appointment of new members is virtually discontinued as a result of a policy of too infrequent rotation, critical self-evaluation may be stymied. The president of a local bar association told us:

Now I think also some of the members of the subcommittee have served for a long time, perhaps they have served well and faithfully, and have been dedicated, but I think that is one of the fallacies in this committee: We have people who have been on it too long. It should be rotated periodically, to have a change, change in faces, change in ideas, new people, new blood.

2. *Alienation of the disciplinary agency from the membership of the bar whose conduct it supervises*—Without provision for adequate rotation, the membership of a disciplinary agency tends to be composed of older members of the bar. As the years pass, the continuing members become less and less representative of the bar they supervise, because those ranks are increased annually by young practitioners, many of whom are members of minority groups who are being admitted to practice in increasing numbers. Since a policy of too infrequent rotation makes the disciplinary agency virtually inaccessible to the newly admitted lawyer, an increasing segment of the bar may come to the conclusion that it is not represented on the agency designated to supervise its conduct. This growing alienation between the disciplinary agency and the bar may develop ultimately into actual resentment of the agency. When that occurs, the disciplinary process is regarded as an outmoded remnant of a decaying power structure, and it ceases to command the support of a significant segment of the profession.

3. *Lack of sensitivity to problems of the public*—There are many matters with which a disciplinary agency must concern itself that do not involve allegations of misconduct warranting formal action. For example, in New York City approximately one half the communications received by the local disciplinary agency do not even set forth prima facie allegations of misconduct. These may involve, for example, requests for legal assistance or com-

plaints attributable to a client's misunderstanding rather than attorney misconduct. Although these matters do not strictly fall within the jurisdiction of the agency, it must nevertheless deal with them. Often this requires great patience and understanding, for although these matters do not fall within the agency's jurisdiction, they present very real problems to the complainant, and the manner in which they are handled may affect the image of the profession in the eyes of a substantial portion of the public. Every disciplinary agency is required to devote a significant portion of its efforts to the handling of such matters. The chairman of a local disciplinary agency explained:

The committees . . . have been instructed over the years that the committee functions as much as a public relations committee as it does a grievance committee, to the end that we never just ignore these . . . letters. We try to have the member write the people or talk with them, and in some way improve the image of the bar with them, all of which is very time consuming.

In the jurisdictions that do not have a professional staff, the busy practitioner who volunteers his time to serve on a disciplinary agency finds himself expending his efforts to disposing of these nonmisconduct matters, although his principal responsibility is the investigation and prosecution of true misconduct complaints. In the first years of his service, the member himself is not fully familiar with the dimensions of the disciplinary agency's jurisdiction, and thus he tends to exhibit patience and understanding in dealing with a complainant who thinks he has a grievance but really does not. As the years go by, however, and the member has less and less difficulty distinguishing between those matters that fall within his jurisdiction and those that do not, he may begin to exhibit some impatience toward the complainant who erroneously assumes that he has a true grievance. Since the disciplinary agency is often the only segment of the organized bar with which the complainant will ever have any contact and from which he will form his impression of the profession, this impatient attitude on the part of a committee member may unintentionally do a disservice to the cause of improving the public image of the bar.

As the foregoing discussion indicates, rotation in disciplinary agency membership must be structured so that the novice member first has time to gain expertise and then time to make use of it. On the other hand, rotation must not be so infrequent that the membership and policies of the agency become rigid.

We recommend three-year terms of service, a limit of two successive terms and rotation of one third of the agency annually.

A three-year term makes it possible for the newly appointed member to use the first year to absorb the necessary expertise from the old members, those in their third year having already served two years when the novice attorney is appointed. During the second year, the new member can begin to make use of his newly acquired expertise. In his third year he should be ready to take on leadership responsibilities and to train newly appointed members himself.

There are several reasons why we recommend a two rather than a one-term limit of service. In the first place, we recognize the desirability of retaining those members who in their first term demonstrate outstanding capability. Second, since these recommendations are intended to be nationwide in scope, they will be considered by jurisdictions with widely varying bars. In some states there simply are not enough attorneys to provide for more frequent, yet effective, rotation of disciplinary agency personnel. We do not recommend, however, that these jurisdictions provide a six-year term for disciplinary agency members, for three-year terms make it possible to remove those members whose performance has been inadequate, a flexibility that should be retained.

It should be noted that we have recommended that hearings by disciplinary agencies should be held before three-man subcommittees. It follows from the considerations here discussed that these subcommittees should be composed of one member of the disciplinary agency in his third year, one in his second year and one in his first year.

Problem 5

Nonrepresentation of substantial segments of the bar on disciplinary agencies.

DIMENSION

Although a significant number of complaints submitted to disciplinary agencies concern the single or small-firm practitioner, lawyers from minority groups and lawyers engaged in negligence and criminal law, there are few lawyers from these groups serving within the disciplinary structure. In part this is caused by the time-consuming requirements of service on a disciplinary agency, requirements the single or small-firm practitioner finds difficult to meet. The problem is aggravated in some large urban centers in nonintegrated jurisdictions where disciplinary responsibility is exercised by volunteer bar associations whose membership does not contain a true cross-section of the entire bar within that jurisdiction.

RECOMMENDATION

Increased emphasis by the appointing authority on including single and small-firm practitioners, members of minority groups and attorneys engaged in negligence and criminal law in the membership of disciplinary agencies.

DISCUSSION

The failure to provide for adequate representation on disciplinary agencies of those practitioners raises several problems:

(1) Disciplinary agencies composed of members who lack expertise in the fields of practice likely to be involved in the complaints they are required to pass on, such as negligence and criminal law, may be unable to evaluate the accused attorney's conduct intelligently.

(2) Effective self-discipline requires that all segments of the profession actively support the disciplinary process. Practitioners who are the subject of complaints and who find that the disciplinary agency is composed of attorneys unfamiliar with the problems they face in their practice may feel that the propriety of their conduct is not being reviewed by a panel of their peers. This may lead to resentment of the disciplinary agency by a substantial segment of the profession.

(3) Similar resentment of the disciplinary agency by a growing segment of the profession may result if meaningful representation

for minority groups is not provided. The president of a black bar association in a jurisdiction with a substantial black lawyer population testified:

That is another thing. We do not have any representation on the committee. I was going to come to that. We don't have what we should have. I think we have one Negro, if I am not mistaken, on the entire grievance committee.

In order to assure adequate representation of all segments of the profession on the disciplinary agency, the appointing authority should make every reasonable effort to place single and small-firm practitioners, criminal and negligence lawyers, as well as members of minority groups, on disciplinary agencies. Difficult as it may be to find these practitioners who are able and willing to devote the necessary time, the effort must be made if the disciplinary machinery is to command the respect it must have within the profession.

Problem 6

Inadequate professional staff.

DIMENSION

The absence of an adequate professional staff, and in many jurisdictions the absence of any staff, presents an insurmountable obstacle to effective disciplinary enforcement. A small state bar noted in a questionnaire circulated by this Committee:

Without professional help, the bar is incapable of taking prompt action in the investigation of serious charges of misconduct. Furthermore, it is virtually unequipped to investigate matters in which no complaint has been filed, but which come to its attention through the press, law enforcement officers and the like. This inaction has contributed in part to a general diminution in public confidence in the profession and its ability to protect society against "bad apples."

Complaints in jurisdictions with no professional staff must be processed, investigated and prosecuted by volunteers. Some attempts have been made to solve this problem by authorizing the use of the investigative and prosecutorial facilities of existing law enforcement agencies. Usually, however, these agencies would be overburdened if required to take on the added responsibility of disciplinary enforcement. The presiding justice of a court having disciplinary jurisdiction summarized his experience with such referrals:

Similarly, we find that the investigative machinery and staff of our local district attorneys are already so heavily taxed by their traditional responsibilities and their more recent involvement in pretrial procedure and postconviction remedies, that disciplinary assignments simply cannot be expeditiously performed by district attorneys.

Consequently, referral of disciplinary matters to law enforcement agencies does not present a viable alternative to an adequate staff.

Other jurisdictions have conferred responsibility for disciplinary enforcement on existing agencies having other primary functions, such as the state board of law examiners. The president-elect of a midwestern state bar association pointed out that such arrangements reflect the secondary importance with which effective enforcement is all too often regarded:

The members of our board of law examiners are . . . appointed because they were good lawyers; they understood the theory of the law; they were good teachers, we will say; and they were the men who were qualified to give the examination and grade the papers; and I

think our members of our state board of law examiners think this is their primary duty and all the other duties that they have thrust upon them by statute are secondary. They have ignored . . . the grievance problem—the unethical practice problem. That is my personal viewpoint, and I think that is one of the reasons we are ineffective in the state.

In concluding that the disciplinary agency staffed by volunteers is inadequate, we intend no reflection on the capability or integrity of those whose devotion to the bar prompts them to offer their services to the critical task of disciplinary enforcement. We are, in fact, impressed by the fact that volunteer enforcement has been able to maintain some sort of disciplinary process in most jurisdictions within the United States. Volunteers, however, increasingly are finding themselves unable to cope with the minimum standards necessary for effective enforcement.

RECOMMENDATION

The employment of adequate full-time professional staff.

DISCUSSION

The use of the volunteer to investigate and prosecute complaints of misconduct entails the following problems:

1. *Delay*—The volunteer attorney can devote only such time to disciplinary enforcement as his private practice will permit. We are all aware of the time-consuming obligations to clients and associates that an attorney in private practice faces. Even the best intentioned volunteer is severely limited in the time he can devote to enforcement. A private practitioner who is chairman of a state bar association disciplinary agency explained:

We are all getting too busy so that we don't have time. We are working for ourselves or in a partnership, and we are too busy to devote much time to the policing of what somebody else is doing.

The chairman of another state bar association disciplinary agency noted that reliance on part-time volunteers often leads to delay in the disposition of grievance matters:

Delay is the worst thing and yet the greatest hazard in any disciplinary system. In spite of all our care, there still is a chance that cases cannot or will not be disposed of as quickly as would be most desirable. This often occurs because a respondent delays in replying or seeks continuances. However, it is partly because most of the work must be done by volunteer members of the bar.

Confidence in the disciplinary process, both on the part of the complainant, who is entitled to prompt action if his allegations are justified, and the accused attorney, who is entitled to prompt

vindication when an unwarranted complaint is filed against him, is undermined.

The chairman of one court disciplinary commission noted that a breakdown in communication between attorney and client was a major source of client complaints:

Our biggest trouble is that many of the lawyers who have had complaints filed against them just will not recognize the fact that they must keep their clients advised, they must keep them attuned as to what the status of the case is, to explain any unusual delay and to answer letters and to answer telephone calls, and to be available when these people want to find out what is the matter or what is happening in their case.

The president-elect of a state bar association concluded that when the client experiences similar difficulties in dealing with the disciplinary agency, his attitude toward the bar generally becomes increasingly negative:

I find that there are more and more complaints that "I have complained to the appropriate agency and I don't hear anything about it," so, they are, in effect, complaining about the bar association and the profession for not doing anything about it.

So, it seems to me that whatever machinery is set up, wherever it may be, that that has to be of prime concern. It is not only appropriate to acknowledge receipt of the complaint, but almost immediately to give some idea of the progress that the committee is making about it. The committee must concern itself with the complaint, because that is the very thing that the person is complaining about with respect to his lawyer—you can't hear anything from him.

Delay in processing complaints also results in exposing the public to harm from the attorney who may remain actively engaged in serious misconduct for an unnecessarily long time. A president of a state bar noted the adverse effect of delay on the reputation of the profession:

You mentioned a while ago in certain situations, particularly in one flagrant urgent case where the lawyer is taking money from his clients, one right after another, or taking retainers from one client after another, not performing the work, just pocketing the money. We have had cases like that. They are most embarrassing.

Our procedure has been too cumbersome to provide the expedited handling of those cases.

2. *Nonuniform standards*—The disciplinary agency that relies wholly on volunteer attorneys seeks to minimize the problem of delay by parcelling out complaints to as many attorneys as possible. Since the handling of each complaint depends largely on the standards of the individual volunteer attorney to whom it has

been assigned, the more volunteers in the process the greater the variation in the standards applied. The chairman of a state disciplinary board outlined some of the results of assigning the investigation of complaints to a large number of volunteers:

One commissioner will spend an enormous amount of time and do a tremendous job in handling complaints which actually may not be very serious. We had a situation not long ago in which a district court commissioner sent us a file half an inch thick on an investigation of a situation where a partner of a lawyer who is the county attorney drafted a criminal complaint for the complainant in the absence of the county attorney and had nothing more to do with the case. A while later there was some indication this attorney might take a civil case against this complainant. Well, I tell you, we had an investigation and report that looked like one of those antitrust briefs. On the other hand, we get some rather serious complaints against attorneys and we send them to the district commissioner and we never hear any more about them. I write to them and tell them we are having a meeting soon and would like to get the report. Sometimes we get it and sometimes we don't. From the standpoint of the individual commissioner it is understandable. They are busy. They have other work to do and this is certainly a side-line or part-time job for them, but I think it points up the need in this area for something in the nature of an investigation or an investigative system where you have someone who has had some experience in it and who knows what he is doing and who possibly gets his expenses paid for doing it.

State bar counsel from another jurisdiction commented on the inconsistent results that result from investigations by volunteer attorneys:

First of all, we find this business of voluntary participation in disciplinary matters leads to extremely inconsistent results and inconsistent efforts. The cost to practicing lawyers to raise enough money to have permanent help whose sole responsibility is to go forward with these investigations has been worth every dime we have paid. We have two men, former F.B.I. agents, who are implacable factfinders, and that is all they do. When a complaint is made, it is fully investigated. Otherwise you get the most inconsistent result with the same set of facts.

3. *Lack of expertise*—Since volunteer attorneys can handle only a limited number of complaints, many have no opportunity to develop the expertise produced by substantial experience. The president of a state bar in a jurisdiction which relies solely on volunteers noted the result:

We cannot expend any money for professional investigation of charges of misconduct. This means that an investigation must be conducted by individual practicing attorneys who, however faithful to their responsibility in the profession, nevertheless have responsibilities to clients which conflict, and who, even though willing, may not have

the expertise to investigate. There are people who are good lawyers who haven't the remotest idea how to ferret out facts.

A state bar commissioner explained that the volunteer attorney's lack of expertise presents a particularly serious problem in the prosecution of formal disciplinary proceedings:

First of all, when we pick a prosecutor, we do not have a prosecutor that has any experience. It is not a very happy task for a lawyer to prosecute another lawyer. So we have selected a different man or two or three men, depending on the nature of the case, to handle the prosecution, none of whom have had much experience doing this. As a result, they take a lot of time learning the ropes to get the prosecution moving.

Moreover, when the prosecution of a formal proceeding conducted by an inexperienced volunteer attorney results in an inadequate trial record, there may be ramifications affecting jurisdictions other than his own if the case results in an appellate decision involving fundamental constitutional issues.

4. *Inability to conduct intensive investigations*—Since the volunteer attorney's time and expertise are severely limited, he is often unable to cope adequately with complaints that require independent investigation or present conflicting evidence. The chairman of a local disciplinary agency in a large urban center told us:

The committees are so bogged down under the present procedures with disposing of the crank letters and letters dealing with very minor items that the committees have very little time to do any work on the complaints that have some serious aspects to them.

Consequently, only those complaints supported by adequate evidence furnished by the complainant may be prosecuted formally. This presents a two-fold problem. First, it gives an unofficial immunity to the attorney whose misconduct occurs in the course of a transaction of substantial complexity. Second, it results in the layman's being made aware, and through him the public, of the ineffectiveness of disciplinary enforcement in his jurisdiction. The complainant who knows that he has been the victim of misconduct is not likely to be impressed with the quality of professional discipline when he is informed that no action will be taken unless he obtains additional evidence the disciplinary agency is unable (or to his mind, unwilling) to obtain.

Moreover, as the chairman of a state bar disciplinary agency acknowledged, the disciplinary agency with limited investigative facilities is more likely to accept the accused attorney's un-

corroborated answer to a complaint, a practice which tends to further undermine public confidence in the disciplinary process:

We perhaps have matters that are disposed of without sufficient information. We have had a tendency on the committee to accept what we call letters of explanation from attorneys. They are, of course, unilateral statements, and in many cases it appears they are self-serving declarations as well. We take those because of the lack of adequate staff to investigate and to see whether those matters actually are as set out in those letters.

A state court administrator also noted that the volunteer attorney who is unable to handle an involved complaint effectively obviously cannot undertake to conduct any independent investigation into serious areas of professional misconduct:

This lack of staff, I think, results not infrequently in cases not receiving the attention which they should have, and matters which a little investigation would disclose to be improper, were never brought to light.

5. *Inadequate recordkeeping*—The problem in disciplinary enforcement posed by the absence of an adequate system of recordkeeping is discussed elsewhere. It is germane to note here that the use of the volunteer attorney may aggravate the difficulty. An adequate recordkeeping system depends on uniformity maintained by specific instruction and close supervision, best achieved when all those involved work in one office. The volunteer attorney system, in which a large number of individuals work separately without effective supervision, renders adequate recordkeeping virtually impossible. The chairman of a local disciplinary agency noted the difficulties he had had in maintaining even records concerning complaints received and the volunteer to whom they were assigned:

We have the four committees, each with a chairman. The position of assignment chairman rotates among these four chairmen, and I occupy at this time the unenviable position of the assignment chairman. All the letters received by the grievance committees come to me. I then in turn rotate them out to the chairmen of the four committees, who in turn send them to the members of the respective committees whose turn it is to handle one. The chairmen are then supposed to report to me, so that I can keep an accurate and complete docket. Now, that is sometimes done, sometimes it's not.

6. *Procedures violative of due process*—Disciplinary agencies that do not provide a professional staff are themselves required to carry out the role of investigator, prosecutor and judge. The usual practice is to have one member of the disciplinary agency investigate the complaint and, when warranted, prosecute that

REPORT ON DISCIPLINARY ENFORCEMENT

complaint before the remaining members of the agency, who sit as judges. The president of a state bar expressed reservations about this practice:

One thing that has never been brought up for discussion to my knowledge, except between individuals, about our procedure is the trial of a case. A quorum of the bar commissioners who act as a jury listening and hearing the case is a minimum of three. The balance of the members of the grievance committee, who are also the members of the board of bar commissioners, are the prosecutors, and it occurs to me that this is one situation I don't think is good for the reason that it is hard for the respondent to understand that from the same group of bar commissioners part of them are prosecuting and part of them are trying him. We do not discuss the case with the grievance committee and know nothing about the case, but still it is a weak spot in the procedure, as I see it.

The secretary-treasurer of a state bar association advised us that a few jurisdictions even permit the investigating member of the disciplinary agency to cast a vote in determining the disposition of the matter after the hearing:

In addition, it is felt that it is not the best procedure for the secretary of the committee, who is also a voting member, by the way, to have such intimate contact with the processing and investigating of complaints, when he is subsequently expected to vote as a member of the committee on what action should be taken on a complaint. As a practical matter, our secretary is frequently placed in the position of being an administrative official, an investigating officer, a prosecuting attorney, and a one-seventh judge at the time the hearing is held.

This merger of the role of prosecutor and judge is not only undesirable but may well constitute a violation of the constitutional guarantee of due process.

These factors make it evident that effective disciplinary enforcement cannot be achieved by relying on volunteer attorneys alone to process and prosecute complaints of attorney misconduct. We, therefore, strongly urge every disciplinary agency to make its first priority the obtaining of funding adequate to enable it to employ a full-time professional staff large enough to abolish the volunteer attorney system. California State Bar counsel advised us that the feasibility of hiring sufficient additional staff to do this is under study now:

One of the possibilities, obviously, for remedying the delay period at the trial stage, after the complaint is initiated until the committee returns the report and its findings, would be to furnish the services of a staff attorney as the examiner, as the prosecutor. That would permit the fully paid attorney a state bar staff for preparing his case, using the investigator. He will be more closely located with respect to them. He would be less subject to other matters taking his time and his

attention. This would be his only job then. That proposal also would include the possibility that after the committee had reached a decision after its hearing, the staff examiner would propose findings and they would be settled in the usual fashion. That would eliminate the time delay that the committee meets in finding time in their busy practice for preparing those findings and conclusions:

Obviously, this is a matter that involves manpower and it involves money. We have just thought about the idea in the initial study. The board has not approved it, nothing formal has been done on it. It is just one method of taking care of the delay.

This is not to say that the volunteer, practicing attorney should be removed from the disciplinary process. To the contrary, the employment of a full-time, professional staff to investigate and prosecute complaints would permit the volunteer members of inquiry and hearing committees to devote their full attention to evaluating cases developed by the staff, a role that should remain the responsibility of practicing attorneys who are fully conversant with the problems of day-to-day practice.

The Third Judicial Department in New York only recently retained full-time staff to process complaints of attorney misconduct. Other jurisdictions are formulating plans to use the proceeds of increased bar dues to retain counsel for their disciplinary agencies.

Counsel to the Grievance Committee of The Association of the Bar of the City of New York estimate that one staff attorney can handle approximately 300 complaints per year, including processing, investigation and prosecution. This figure, however, assumes that the attorney is located in an urban area where travel time is not a significant factor. In jurisdictions where staff attorneys would have to travel extensively, the number of complaints each staff attorney could handle would have to be reduced appropriately. Jurisdictions that receive less than 300 complaints per year (as adjusted for geographical consideration) might well consider hiring part-time counsel or, as seems more desirable, hire full-time counsel and assign him bar-related responsibilities in addition to disciplinary enforcement. This has been done in Alaska, for example, where the executive director of the state bar also serves as bar counsel and is in charge of admissions to practice.

Hiring of paid investigators, while also desirable where feasible, should not be given first priority. A staff attorney, armed with subpoena power and funds to hire experts when necessary, is able to cope adequately with most situations requiring investigation.

REPORT ON DISCIPLINARY ENFORCEMENT

Since he is also available to prosecute complaints, he is a more useful addition to the disciplinary staff than an investigator.

Problem 7

Absence of training programs for disciplinary agency staffs.

DIMENSION

The increased awareness of the necessity for effective disciplinary enforcement, reflected in the appointment of this Committee and the cooperation afforded to it by state and local disciplinary agencies across the country, will result, it is hoped, in the establishment of professional disciplinary staffs in those jurisdictions where none now exist and the expansion of professional staffs (often consisting of only one attorney) where they now exist. With the exception of those few jurisdictions that now have a staff of more than one attorney, such as California, Florida and New York City, and are able to maintain some continuity of expertise, no facilities exist for training new staff members. In jurisdictions that rotate the members of their disciplinary agencies annually, the staff attorney provides the only potential for continuity of experience. The absence of facilities for the training of the staff, therefore, may aggravate the problem stemming from lack of expertise. The chairman of a state bar disciplinary agency plagued by annual rotation of members testified:

A corollary to rotation of disciplinary agency members annually is the lack of a training program for members of the committee and the staff. Members named to the committee come in and have no specific training. What we get we pick up from reading the statute and talking to those who have been on the committee before. There should be something worked out to train not only the members of the committee, and at least give some specific instructions as to what their duties are and how to perform them. There ought also to be some specific training for new staff members who are employed.

RECOMMENDATION

Development of courses in enforcement practices, procedural manuals and other procedures for training professional disciplinary agency staffs by the proposed National Conference on Disciplinary Enforcement.

DISCUSSION

The dimensions of this report demonstrate that the field of disciplinary enforcement is a specialty of significant proportions. Without training, the attorney retained as counsel to a disciplinary agency will find himself confronted with countless problems with which he will be unable to cope. Unless he has some source to turn

to for assistance, he will have no alternative but to do the best he can by trial and error. The skill and knowledge he will ultimately acquire will have been obtained at the expense of waste, inefficiency and ineffectiveness. In the meantime, he may lower the prestige of the profession in the eyes of nonlawyers with whom he will have come into contact and to whom he represents the organized bar.

The absence of any facilities for training professional disciplinary agency staffs has more subtle but equally serious ramifications. The untrained attorney, faced with problems he is not equipped to evaluate, will rely as much as he can on the practices and procedures of his predecessors, volunteer and professional, in similar circumstances. As a result, existing practices may be perpetuated without any critical evaluation, and the opportunity for revision and improvement, ordinarily a dividend of periodic changes in personnel, will be lost.

This Committee is recommending the establishment of a National Conference on Disciplinary Enforcement to assist in implementing its report. It is contemplated that the proposed conference also would serve as a continuing organization to bring reforms to the field of professional discipline, periodically bringing together all those engaged in the disciplinary process, including judges, disciplinary agency members and counsel, for consultation on mutual problems. In addition, a permanent staff would be maintained to assist disciplinary agencies throughout the nation by coordinating their collective expertise.

This proposed structure is ideally suited to develop and administer a training course for professional disciplinary agency staffs. It would have the following features, which local jurisdictions themselves would be unable to provide:

1. *A faculty drawn from leading bar counsel across the country* — This would expose the enrollee to the varied experience and outlook of a number of disciplinary agencies, raising his horizon beyond the agency that employs him.

2. *An objective approach stemming from the consideration of problems in disciplinary enforcement in their broader national perspective rather than in the context of existing procedures in a particular jurisdiction* — This will better prepare the enrollee to evaluate critically the procedures in existence in the jurisdiction which employs him.

3. *The opportunity to become personally acquainted with*

counsel (both faculty and fellow enrollees) engaged in disciplinary enforcement throughout the United States—These personal contacts would prove to be an invaluable aid when he seeks expertise or cooperation with respect to future problems.

4. *Administrative expertise and availability*—The preparation of an effective curriculum requires considerable experience in disciplinary enforcement as well as a substantial investment of time. Local disciplinary agencies that are now understaffed, if staffed at all, are not able to develop an instruction course in effective disciplinary enforcement for the novice attorney. Nor are these agencies likely to hire staff beyond that absolutely required to process disciplinary matters. Consequently, the time any member of the staff of a local disciplinary agency devotes to the planning, preparation and execution of a staff training course will, of necessity, cause some disruption in the agency's enforcement efforts.

The proposed National Conference on Disciplinary Enforcement can provide other assistance to the developing local disciplinary agency. The chairman of a state bar disciplinary agency suggested, for example, the desirability of formulating a procedural manual:

There has been a suggestion that perhaps a training manual might be prepared that could be put into the hands of members who are appointed to the grievance committee and that it might be followed up by an annual one-day study course for people on the committee itself or for the staff.

The staff of the proposed National Conference on Disciplinary Enforcement would be ideally suited to prepare a manual incorporating the essence of proper and effective procedures as well as the purpose, techniques and philosophy of disciplinary enforcement.

A central legal memorandum index could be established and maintained at the conference center, enabling local counsel promptly to obtain memoranda on a substantive question of law novel to him but which has been considered and researched by counsel in another agency. Indeed, the usefulness of the proposed conference to the staffs of local disciplinary agencies appears to be limited only by the financial and manpower resources it will be able to muster.

Part B-Practice and Procedure

Problem 8

Few investigations initiated without specific complaint.

DIMENSION

Effective enforcement requires that disciplinary agencies investigate all instances of attorney misconduct that come to their attention, regardless of the source, without awaiting a specific complaint. Most disciplinary agencies are authorized to institute investigations and disciplinary proceedings on their own initiative. In many jurisdictions, however, this authority is rarely used, and the disciplinary agency acts only when a specific complaint is submitted to it. The reasons for this may be an inadequate staff or funds to process complaints much less initiate investigations, the absence of reliable sources of information concerning attorney misconduct other than specific complaints, and occasionally the absence of initiative on the part of disciplinary authorities. A member of a state bar disciplinary agency in a jurisdiction having no staff testified:

As a practical matter, I believe that practically all the proceedings are initiated by individuals. This committee, at least during the time I have been on it, has not taken the position that we should go out looking for things to complain about and initiate, and has waited until somebody, either a client or another lawyer, has brought it to the attention of the committee.

The chairman of another state bar disciplinary agency noted some of the factors that contribute to the failure to initiate investigations without complaint:

Another problem is few continuing investigations into major areas of professional conduct, and that goes back to the lack of adequate staff to investigate and lack of continuity on the part of membership to provide direction for the committee. We are, as a result, dependent solely on individual complaints which come in.

Some jurisdictions, on the other hand, have made special efforts to ferret out attorney misconduct without relying on complaints. They have established sources of information to learn of misconduct not likely to be the subject of complaints because no specific individual is aggrieved, such as criminal convictions for perjury or income tax fraud. Several jurisdictions even have established continuing judicial inquiries to conduct investigations into areas of practice where misconduct exists but is not likely to

result in complaints because the client as well as the attorney benefits from the activities. For example, judicial inquiries to inquire into practices in the personal injury field exist in the Second and Fourth Judicial Departments in New York, and one has been established recently in Philadelphia. In New York's First Department, the jurisdiction of the Coordinating Committee on Discipline, originally limited to the personal injury field, has been expanded to encompass any area of practice in which there is evidence of systematic misconduct.

RECOMMENDATION

Initiation of investigations without awaiting specific complaints; establishment of sources of information concerning attorney misconduct not likely to result in specific complaints; continuation of investigations into known areas of systematic misconduct.

DISCUSSION

The problem of inadequate professional staffs and resources is discussed elsewhere. Here we discuss only the procedures that are desirable in order to cope adequately with misconduct not likely to be the subject of specific complaints, assuming the availability of adequate resources.

In July of 1928, Benjamin N. Cardozo, then Chief Judge of the New York Court of Appeals, upholding the power of the courts to inquire generally into the existence of professional misconduct in the absence of complaint against a specific attorney, stated that "if the house is to be cleaned, it is for those who occupy and govern it, rather than for strangers, to do the noisome work," *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 480. It is this concept on which self-discipline is predicated, and Judge Cardozo's statement often has been quoted with approval by courts.

If, as Judge Cardozo concluded, the responsibility for disciplinary enforcement properly falls on the bar itself, it follows that the standards of conduct to which its members must adhere are those formulated by the profession, not by others. Effective enforcement, therefore, requires more than simply taking action when those outside the profession complain. Laymen, as the past president of a state bar noted, are not generally familiar with ethical standards:

REPORT ON DISCIPLINARY ENFORCEMENT

We don't have anybody we send around looking for rocks to find things under, and so what we get are almost every kind of complaints from the lay person. In my experience it was very unusual—not that it didn't happen, we did have a few from practicing lawyers—but generally, the complaints come from lay people who do not know what is ethical and what is not ethical, except in mishandling money and the lack of communication when the lawyer didn't tell them what is happening in their lawsuit. In those areas they did. But in the other ethical areas, the people do not really appreciate what our standards are and what is to be done.

Disciplinary action must also be taken against attorneys whose conduct, while not the subject of a complaint, nevertheless violates the standards fixed by the profession. The chairman of a state bar association disciplinary agency in a jurisdiction having a very substantial attorney population outlined the necessity for not simply relying on complaints:

I have said that if the objective of a grievance procedure is to process reports of wrongdoing that the bar association receives from a person, then I think we are doing an adequate job If the real objective of grievance procedure is to police the profession with reasonable uniformity and to try to rid the profession of dishonest practitioners to the extent that that is possible, then I would have to admit to you that our procedure falls far short of realizing that objective.

The reason is that the first objective and the second are not the same thing. And the reason they are not the same thing is that in order to adequately police the profession you would have to get reports and things that you don't get simply by waiting for them. You have to go out and dig.

In order to initiate investigations without specific complaints, the disciplinary agency must have available sources of information likely to disclose attorney misconduct. The chairman of a state disciplinary commission noted that the criminal conviction of an attorney, for example, may not come automatically to the attention of the disciplinary authority and may never be the subject of a complaint:

We get information about disbarments in other states, and I assumed that this got into our file because of some systematic arrangement. But this is not so. It gets into our file because there will be a newspaper article in "X" town in another state that shows an attorney has been convicted of a felony in another state. This is how. Unless that is seen, why, you would not know about it, I guess.

When the bar takes no action against a convicted attorney because the disciplinary agency is unaware of the conviction, other members of the public who may know of the conviction may conclude erroneously that the profession acquiesces in the

attorney's continued eligibility to practice despite the conviction. The establishment of sources of information enabling the disciplinary agency to become aware of all attorney convictions is necessary, not only to remove those who are unfit, but to maintain the integrity of the profession in the eyes of the public as well.

One step to accomplish that purpose is the use of a newspaper clipping service. Its utility was described by state bar counsel from Wisconsin:

We have a statewide news clipping service furnished by the Wisconsin Press Association, which helps us keep tuned to some of the problems involving members of the bar. We also subscribe to a number of the metropolitan newspapers, to help us in that detection system, and this feeds into our program of self-initiating complaints.

The most direct method for the disciplinary agency to make certain that it is notified of all attorney convictions is to make arrangements to have the clerk of every trial court instructed to certify these convictions to the disciplinary agency immediately. This is done in New York City, for example, where arrangements also have been made with the police department to have the local disciplinary agency promptly notified whenever any individual who gives his occupation as attorney is arrested.

These procedures will disclose only attorneys convicted within the disciplinary agency's geographical jurisdiction. They will not show convictions of local attorneys that occur elsewhere. It is anticipated that if the National Disciplinary Data Bank, which is discussed elsewhere, functions effectively, it will be expanded to provide for the nationwide exchange of information between disciplinary agencies on attorney convictions. In the meantime, disciplinary agencies will have to rely on voluntary cooperation with each other for this. If a local disciplinary agency makes arrangements with the courts and police department or subscribes to a newspaper clipping service, it will be notified of attorney convictions within its geographic jurisdiction regardless of where the convicted attorney is admitted to practice. Upon receiving information concerning the conviction of an attorney not admitted to practice in that jurisdiction, the local disciplinary agency should determine where the attorney is admitted and then promptly notify the appropriate disciplinary authorities.

Another major source of information concerning attorney misconduct is the local law enforcement agency. In the course of

investigations into criminal activity, the law enforcement agency often obtains evidence of the involvement of an attorney indicating conduct on his part which, while not justifying indictment, is unethical. The law enforcement agency, which is solely concerned with criminal conduct, ordinarily would not call the matter to the attention of the disciplinary agency. In order to obtain this information, the disciplinary agency should initiate a liaison with local law enforcement agencies through which evidence of serious misconduct on the part of an attorney will be received.

These procedures are not likely to be effective in uncovering misconduct involving concerted action by the attorney and client for their mutual benefit and not the subject of investigation by law enforcement authorities. Conspiratorial misconduct frequently takes place in the personal injury field in which attorney and client may file exaggerated personal injury claims, or in the immigration field in which attorney and client may arrange fraudulent marriages for the sole purpose of admitting an alien to the United States, or in the criminal law field in which an attorney may make arrangements with a bail bondsman to have cases referred and the legal fee divided between them. A state bar counsel pointed out that, if a disciplinary agency is to maintain adequate discipline, these and similar instances of covert and continuing misconduct must receive the agency's attention although no specific complaints are made:

A second area where it is necessary to get real effective bar discipline is to depart from the idea that disciplinary action is taken only on the basis of complaints. Complaints must be handled, but there are greater offenses that you will never receive complaints on, and until something is done to find the bad egg whose thieving clients are not complaining, you're not going to get proper bar discipline.

Efforts to uncover this sort of misconduct cannot be discussed generally but depend on the specific misconduct under investigation. A few examples of approaches actually employed, however, will illustrate the kinds of technique that must be developed.

Three of the four judicial departments in New York, faced with evidence of systematic solicitation in the personal injury field, adopted a court rule requiring attorneys to file a detailed statement concerning each contingency retainer and an equally detailed closing statement when the case is concluded. These required statements were described to us by bar counsel:

The statement of the retainer sets forth the facts of the accident and gives the name, address and occupation of the referring party.

Upon conclusion of the case, by settlement or judgment, an attorney must file a closing statement with the Judicial Conference of the State of New York, the court's main administrative agency, which sets forth exactly how the monies are to be distributed, how much the client nets, what the attorney takes as his fee, together with a complete and itemized statement of disbursements and costs of the litigation.

A continuing review of the statements of retainer is conducted, enabling the disciplinary agency to determine those attorneys who seem to be retained in an unusually high number of cases. Their practices may be subject to specific investigation to determine whether the case volume results from solicitation. Bar counsel explained:

We may come to this conclusion based upon the volume of statements of retainer filed. If a man is so successful that he files two and three statements a day, and we have attorneys in this jurisdiction who filed 800 and 900 statements of retainer a year, perhaps we might want to know how he comes by so much legal business.

One section of the retainer statement requires the attorney to disclose the source of the client referral. This enables the disciplinary agency, when solicitation is suspected, to investigate the truth of the attorney's representation concerning the manner in which the retainer was obtained. Since a false statement in any report can itself result in discipline for misrepresentation, this recordkeeping requirement greatly facilitates enforcement.

The Boston Bar Association has established liaison with the American Insurance Association in order to obtain evidence concerning attorneys who systematically file exaggerated personal injury claims. This conduct is not likely to result in a complaint because the attorney and client benefit equally. The necessary evidence is not likely to be discovered by a single insurance company; one exaggerated claim filed could be explained away as an isolated mistake. The full scope of the misconduct is revealed only by evidence that the attorney has filed exaggerated claims against several insurance companies, a course of conduct disclosing a deliberate pattern.

In Michigan the disciplinary agency has made arrangements with appellate courts so that it is notified whenever a motion to dismiss an appeal for failure to prosecute is granted. On receipt of this report, an investigation is initiated to determine whether the dismissal resulted from attorney neglect.

REPORT ON DISCIPLINARY ENFORCEMENT

Development of these and similar procedures suitable to the task of uncovering unethical practices in known areas of misconduct evidences a commitment not only to process individual grievances but truly to have those who "occupy and govern" the profession do the "noisome work" in maintaining its high standards.

Problem 9

Government attorneys, house counsel for corporations and other attorneys who are not subject to discipline in the jurisdictions in which they actually practice.

DIMENSION

In every jurisdiction there are attorneys practicing law who are not formally admitted to practice locally. Many of them are employees of the Federal Government or house counsel for corporations. Since they are not members of the bar of the local court having disciplinary jurisdiction, they are not subject to disciplinary action by that court. This was illustrated in the following colloquy between a member of this Committee, the chairman of a local disciplinary agency and a state bar counsel:

Question: I just wanted to ask, do you consider that corporate counsel who are not members of the state bar, assuming that's possible; is that possible?

Answer: This is possible, yes, sir.

Question: Do you consider that corporate counsel who are not members of the state bar are subject to the jurisdiction of the grievance committees?

Answer: That question has arisen, but I would assume not . . . That's a very interesting point. If they're not licensed in the state we have absolutely no authority over them except as an unauthorized practitioner; we can stop them from practicing law.

Question: That same thing applies to government counsel practicing in the state but who are not licensed by the Supreme Court?

Answer: Well, we don't think we have any powers over federal government lawyers in any capacity unless they come into state court, in which case we would have some authority.

The greatest concentration of practicing but nonadmitted attorneys exists in the District of Columbia. Attorneys who maintain their offices in the District are not required to be admitted to the United States District Court for the District of Columbia, the court having disciplinary jurisdiction, unless their practice requires that they actually appear in that court. Consequently, private practitioners who restrict themselves to appearances before federal agencies, attorneys employed by these agencies and other attorneys who specialize in a form of practice not requiring appearance in court are not formally admitted to practice. A judge of the District Court acknowledged that the court has no disciplinary jurisdiction over these nonadmitted practitioners.

REPORT ON DISCIPLINARY ENFORCEMENT

Now, we do have a problem here in the District of Columbia, in my opinion, . . . four thousand lawyers in the District who are not members of the bar. That means they are not members of the bar of the United States District Court for the District of Columbia. Many of them are in government, but many, many of them are in private practice. They are in private practice because they come here, some as government lawyers, and then go into private practice, some come here to open up their own law offices and practice but their only practice is before the federal agencies. We do not admit and we do not discipline lawyers before the federal agencies.

RECOMMENDATION

A court rule providing that any attorney who regularly engages in the practice of law within a jurisdiction or is admitted to practice for a particular matter thereby submits himself to the disciplinary jurisdiction of that court regardless of where he may be formally admitted.

DISCUSSION

Usually the court which has the power to discipline an attorney is situated in the state where the attorney maintains his office or where the misconduct occurs. But this is true only if the attorney is admitted to practice before the court. If he is not, jurisdiction to discipline him is limited to the state in which he is admitted, and effective disciplinary enforcement is seriously impaired. Neither the community in which the attorney continues to practice nor the community in which the misconduct took place is able to take action. Even if the disciplinary authorities in the state in which the attorney is admitted evidence an interest in proceeding against him, although the attorney does not personally pose a threat to the citizens in their state and may not have had any contact with that state for many years, it may be difficult for them to obtain the necessary evidence to sustain charges. Moreover, if formal charges are presented, they must be decided on the basis of the standards of conduct in the state of admission, and these may differ from those in the state where the misconduct occurred and the attorney practices.

Similar difficulties arise with respect to discipline of attorneys in the District of Columbia who engage in specialized practice before one of the federal agencies. These attorneys are admitted to practice before the agency simply by filing a statement certifying that they are admitted and in good standing in the highest court of any state. Since they have not been admitted to practice by the District Court for the District of Columbia, they are not subject to

its disciplinary jurisdiction. They are, of course, subject to discipline by the agency before whom they are admitted, but this power is limited to the attorney's right to practice before that agency. Even if an attorney is removed from the rolls of the agency before whom he has practiced because he has been guilty of misconduct, he is nevertheless free to continue to engage in any other form of practice that does not require him to appear before the District Court unless action is taken against him by the disciplinary authorities in the state where he is admitted.

A judge of the United States District Court for the District of Columbia noted that the practice of limiting disciplinary jurisdiction to those states in which an attorney is formally admitted has resulted in the creation of a class of attorneys who, although engaged in the practice of law, are not subject to any effective disciplinary supervision:

Because as long as you have people whom State X has not seen in twenty years or twenty-five years, State X is not going to be concerned about any discipline with that lawyer. We have got him here for twenty or twenty-five years, we can't do anything with him and he is a free agent, actually. I think that is a problem.

The number of attorneys who practice in this unofficial "sanctuary" continues to increase as the jurisdiction of the Federal Government and its regulatory agencies expands and more and more attorneys are employed by the Federal Government and corporations to serve in states other than those in which they are admitted formally to practice.

A similar problem exists in some jurisdictions with respect to attorneys admitted to practice for the purpose of a particular matter only. In Texas, for example, a disciplinary proceeding must be prosecuted in the district court for the county of the attorney's residence. If the attorney does not reside in Texas, the courts of that state are unable to discipline him even though the misconduct occurred during a matter with respect to which the attorney has been formally admitted to practice. State bar counsel explained:

There is absolutely no way to discipline a lawyer licensed by the Supreme Court of Texas living outside of the State of Texas, even though he comes into Texas and practices law. The rules say you must discipline in the district court of the county of his residence. If he lives in Richmond, Virginia, and comes down here with a Texas license, how do we reach him? I say the Supreme Court can reach him, but they turned me down on a similar situation because the lawyer didn't have a license in Texas, as such. He had a temporary license

REPORT ON DISCIPLINARY ENFORCEMENT

because he was admitted in connection with another lawyer, and I thought the Supreme Court could oust him, but they didn't do it.

Corrective action is needed to insure that all who practice law are subject to effective disciplinary supervision and to enable the courts to supervise all attorneys who are engaged in the practice of law within their jurisdiction. This may be achieved simply and effectively by the adoption of a rule by the court having disciplinary jurisdiction providing that any attorney who regularly engages in the practice of law within its jurisdiction or is admitted to practice for a particular matter thereby submits himself to the disciplinary jurisdiction of that court regardless of where he may be formally admitted to practice. If this rule is adopted, all lawyers practicing law within a jurisdiction will be subject to identical standards of conduct and identical discipline for any breach of such standards.

Problem 10

Insistence by disciplinary agencies on unnecessary formalities, including verification of complaints.

DIMENSION

Many jurisdictions provide by statute, rule or practice that complaints against attorneys must be verified before being considered. This policy often is enforced rigidly, regardless of the gravity of the conduct disclosed by an unverified complaint. The president of a small integrated state bar testified:

We made it very clear to the complainant that we would be very happy to consider his complaint if he would verify it. He refused to do so . . . but the charges in there were serious against this lawyer. But it is out position and in our rules that if the complainant will not verify, we will not entertain the complaint.

RECOMMENDATION

Abolition of the requirement that complaints must be verified and the minimization of other formalities.

DISCUSSION

The policy of refusing to consider complaints unless they are verified usually is justified on the ground that the complainant should be made aware of the gravity of filing a complaint and should be forced to weigh seriously the accuracy of his allegations. A member of a state bar disciplinary commission explained:

But from our short experience we do find that the requirement of a verified complaint will eliminate many scurrilous attacks and unjustified attacks upon lawyers. And we feel if people are going to be sincere in making a complaint against a lawyer, they should be willing to put it in writing and, if it is true and correct, to verify it.

Unfortunately, the practice of requiring verification of complaints may be interpreted by the complainant as an implied threat that he will be prosecuted for perjury or exposed to a lawsuit if any of his allegations are inaccurate. A member of a state bar disciplinary agency that does not require verification of complaints pointed out that the verification requirement may often cause the withholding of a legitimate complaint:

It seems to me that not having an immunity statute and requiring verified complaints would seriously handicap any effective disciplinary proceedings. I make this observation because . . . we have an immunity statute which grants immunity to those participating in the proceedings. We also grant immunity to complainants. We do not require verified complaints, but we do require that the complaint be

REPORT ON DISCIPLINARY ENFORCEMENT

in writing. The attorney is protected in that he receives a copy of that complaint, he is afforded an opportunity to respond, and, of course, in due course of any proceeding, the complainant must take the stand and testify. I suggest that other states give some consideration to not requiring verified complaints, but to putting through the Legislature a statute granting immunity.

It is not difficult to see why a requirement that complaints be verified may intimidate the complainant who acts in good faith. The unsophisticated complainant approaches the filing of a complaint with reservations. He realizes that he is asking a group of lawyers to take action against one of their brethren. He is aware that he has slight knowledge of the standards of the profession and that the attorney's conduct he questions may not violate the Code of Professional Responsibility. He often feels that he cannot state his complaint adequately because his attorney has not kept him properly informed. Moreover, the complainant often finds that his inability to use language precisely, combined with his ignorance of the underlying facts and applicable law, make it difficult to be precise.

When the disciplinary agency asks a complainant in this frame of mind to verify his complaint, all his fears and doubts may be reinforced. Not sure whether he has a complaint, uncertain as to the facts and not satisfied that he has expressed himself well, the complainant now finds that he must swear that his allegations are accurate. Having no knowledge of the criminal law, the complainant may envision this request as an attempt to entrap him into doing something that would expose him to criminal prosecution for errors in his complaint, no matter how trivial or unintentional. Faced with what impresses him as an enormous risk in order to have his allegations (which he is not even certain warrant action) examined, the complainant may decide to forgo the filing of a complaint. How many persons do not even contact a disciplinary agency because they are aware of this policy cannot be determined.

The policy of accepting only verified complaints intimidates not only the malicious complainant but also the sincere complainant. Therefore, the policy and its consequences must be considered carefully.

By preventing the filing of false and malicious complaints, the requirement that complaints be verified avoids inconvenience to an attorney who might otherwise have to answer allegations. While it is theoretically possible that a miscarriage of justice might also

be prevented, that seems unlikely as a practical matter. The screening procedures inherent in the disciplinary process are far too extensive to permit the filing of formal charges, much less findings sustaining them, on the basis of false allegations, necessarily uncorroborated.

On the other hand, intimidation of the complainant who genuinely believes himself to have been wronged may result in injustice. The complaint not filed might have exposed an unethical practitioner and resulted in the institution of proceedings to remove him. Instead, the malefactor may continue to practice, thereby not only denying relief to the prospective complainant but endangering other innocent clients as well.

In determining whether to follow a policy of requiring verified complaints or strict adherence to other formalities, the bar is placed in the position of choosing between protecting its members at the risk of harming the public or of protecting the public at the risk of some inconvenience to its members. It is by choosing the policy in the public interest that we demonstrate the high standards of our profession.

A similar insistence on other formalities is as equally unwarranted when complaints allege apparently substantiated misconduct of a serious nature. For example, many disciplinary agencies routinely request that a complainant fill out a complaint form before his allegations are considered. Occasionally, a complainant may be reluctant to do so, either because he has no confidence in his ability to state his complaint adequately or because he suspects he might subject himself to some sort of difficulty if he submits anything in writing. If his allegations involve serious misconduct and appear to have some basis, the disciplinary agency's refusal to consider the complaint merely because the usual form has not been completed unduly emphasizes form over substance. Effective disciplinary enforcement requires that such formalities be discarded in appropriate circumstances.

In addition to avoiding unnecessary formalities that may intimidate the complainant, there must be greater dissemination of information to the public to disclose the existence and availability of the disciplinary machinery. The disciplinary agency at the very least should take steps to encourage law enforcement agencies, consumer protection organizations and similar agencies to whom a complainant may turn to refer appropriate matters.

Problem 11

Lack of absolute immunity for persons filing complaints with a disciplinary agency.

DIMENSION

Whether and under what circumstances a person submitting a complaint to a disciplinary agency may be subject to suit by the attorney concerned has been the subject of increasing litigation in recent years. (See annotations, 87 A.L.R. 696, 77 A.L.R. 2d 493.) While many states have not settled this question, a majority of those that have done so hold that a complaint is absolutely privileged, for the public interest requires that those who suspect wrongdoing have access to an agency which can determine the merits of their allegation. (*Cowley v. Pulsifer*, 137 Mass. 392 (1884); *McCurdy v. Hughes*, 63 N.D. 435 (1933); *Toft v. Ketchum*, 18 N.J. 280 (1955);* *Wiener v. Weintraub*, 22 N.Y. 2d 330 (1968); and *Ramstead v. Morgan*, 219 Or. 383 (1959).) Other states, however, have held that only a qualified privilege attaches to complaints to disciplinary agencies and that a civil action for damages may be brought by the attorney concerned if he can demonstrate malice on the part of the complainant. (See, for example, *Lee v. W.E. Fuetterer Battery and Supplies Co.*, 323 Mo. 1204 (1929); *Toomar v. Breaux*, 146 So. 2d 723 (La. Ct. App. 1962). See also *Albertson v. Raboff*, 46 Cal. 2d 375 (1956), holding that the privilege is limited to an action for defamation and does not apply to an action for malicious prosecution.)

RECOMMENDATION

A court rule providing that any individual who submits a complaint against an attorney to an authorized disciplinary agency shall have absolute immunity from any suit predicated thereon.

DISCUSSION

Public interest in the integrity of the profession is best served by encouraging "those who have knowledge of dishonest or unethical conduct to impart that knowledge to a grievance committee or some other body designated for investigation", *Weiner v. Weintraub*, 22 N.Y. 2d 330 (1968). As long as the

* Shortly after the decision in this case, the New Jersey Legislature enacted a statute authorizing a civil suit to recover for damages resulting from a complaint filed with malice. The constitutionality of this statute is subject to serious question. See *Ramstead v. Morgan*, *infra*, in which a similar statute was struck down as an unauthorized interference by the legislature with the court's exclusive disciplinary jurisdiction.

complainant remains subject to suit by the accused attorney, however, many legitimate complaints will never see the light of day. Complainants, untrained in the law, uncertain as to the facts and often uneducated, will be reluctant to add to their troubles by taking any action that may result in their becoming defendants in a lawsuit. This conclusion was supported by the testimony of the secretary of a state bar in a jurisdiction which provides absolute immunity to complainants:

If you don't have absolute immunity and you have verified complaints, how can you justify a complaint by a layman who doesn't know? Do you get a lawyer to represent him? If we set up too many requirements, like verification and no immunity, we are not going to get very many complaints, because they are not going to want to be sued.

Some jurisdictions have attempted to resolve the problem by providing immunity from suit unless malice is shown. Unfortunately, some attorneys, angered by what they believe to be an unjustified complaint, have instituted suits alleging malice, although they have no evidence to support that claim. These attorneys are not interested in obtaining a judgment against the complainant. They have sustained no real damage because publication of the complaint has been limited to the members of the disciplinary agency. Moreover, in many instances the complainant is judgment proof, and the suit may be motivated solely by a desire "to teach the complainant a lesson." Incurring no significant cost himself, the attorney is able to force the complainant to retain counsel and to undergo the expense of substantial discovery proceedings, and then on the eve of trial he can either settle for a nominal amount or even discontinue the action.

Theoretically, such conduct might itself warrant disciplinary action against the attorney, but this would require the almost impossible task of demonstrating that the allegation of malice itself was not made in good faith. As a result, a policy of limited immunity does not protect the complainant adequately and may result in the withholding of legitimate complaints from the appropriate disciplinary agency. This was the conclusion reached by Chief Justice Vanderbilt of the Supreme Court of New Jersey in *Toft v. Ketchum*, 18 N.J. 280, 286 (1955):

If each person who files a complaint with the ethics and grievance committee may be subject to a malicious prosecution action by the accused attorney there is no question but that the effect in many

REPORT ON DISCIPLINARY ENFORCEMENT

instances would be the suppression of legitimate charges against attorneys who have been guilty of unethical conduct, a result clearly not in the public interest.

A policy of conferring absolute immunity on the complainant encourages those who have some doubt about an attorney's conduct to submit the matter to the proper agency, where it may be examined and determined. A complainant's ability to address such a forum without fear of suit is essential if the profession is to maintain high standards. The individual attorney may suffer some hardship as the result of the occasional filing of a malicious complaint, but a profession that wants to retain the power to police its own members must be prepared to make some sacrifice to that cause.

It is unlikely, moreover, that even a malicious complaint will cause any damage beyond some inconvenience. The members of the disciplinary agency to whom the complaint is submitted will surely not hold it against the attorney, for their very function is to separate meritorious from undeserving complaints. The policy of disciplinary agencies not to divulge the existence of complaints while they are being investigated effectively protects the attorney from any public disclosure. Thus, the attorney is given more practical protection than a party to an ordinary lawsuit, who may be the subject of prejudicial statements made by his adversaries in the pleadings and in open court. These generally are regarded as absolutely privileged and may be, and often are, publicly disclosed.

Problem 12

No permanent record of complaints and their processing.

DIMENSION

Many states report that they do not maintain permanent records of complaints received and their processing. The president of a small state bar with no professional staff testified:

We have no central control of disciplinary files, so that there are many disciplinary matters which are sent to the local administrative committees for disposition, and no one knows what ever happened to them. They just simply disappear in a kind of limbo. And the lawyer who is under a cloud may never determine whether the cloud has been removed. The complainant may never know whether justice has been done or whether he has been satisfied.

The problem of inadequate recordkeeping exists even in jurisdictions that have a professional staff, particularly where disciplinary jurisdiction is divided into smaller units within the state. State bar counsel from one such state told us:

Several years before I came to the bar, the state bar had printed and bound a docket book for the grievance committee. Each grievance committee had a real nice bound docket book embossed with the gold seal of the state bar, and they were quite expensive. These books cannot be located. I doubt if there are two or three in the whole state that we can find. What happened, some chairman or secretary originally received these books and made entries in them of the most confidential nature. When he went off the committee he probably stored them in his private files, and that's the last of it.

Now, I don't know what the final outcome of that would be. I imagine when that lawyer dies, his heirs will be rummaging around the docket books and will read all the scandals. That's awfully sloppy, and we should have a system of taking care of these records.

Many disciplinary agencies are becoming increasingly concerned with the failure to maintain adequate records and are taking remedial action. The president of a state bar association testified:

The degree of keeping records has been dependent on how efficient the ethics chairman has been each year. In some cases, we have had excellent records kept which have been turned over to the new chairman each year. In other cases, they have not been good at all. We felt in the bar association executive board that something should be done about this. So, using bar association funds, early this year we hired an attorney, who was an excellent researcher at the same time, and asked him to go back as far as our good records went—in some cases they went back to 1955—and begin to prepare a name and attorney index on the one hand and subject matter index on the other hand.

Using a few examples, take the ethical violation of communicating

REPORT ON DISCIPLINARY ENFORCEMENT

with the client of another attorney without permission in a matter which is controverted. Normally, this is not considered a major ethical violation, but on the other hand, if this attorney complained against has done this for the sixth or seventh time, it can be a pretty important matter.

There was no real way of our knowing it, except when a member of the committee remembered it; there were no records showing whether there had been prior complaints against this attorney. So we are bringing this up to date, using bar association funds.

On the other hand, there are states that do not maintain permanent records as a matter of policy. One of these reported that no permanent record is kept of complaints that are ultimately dismissed, "on the theory that it is unfair to the attorney to 'have a record'" when the complaint has been found to be unwarranted.

RECOMMENDATION

Maintenance of a centrally located permanent record of every complaint and its processing.

DISCUSSION

Complaints submitted to disciplinary agencies are closed without affirmative action for a variety of reasons—the majority because they are unfounded; others because there is insufficient evidence to sustain the burden of proof required to establish the charges; still others, in jurisdictions which do not authorize informal admonitions by the disciplinary agency, because the nature of the misconduct is not sufficiently serious to justify the institution of a formal proceeding. There are compelling reasons for maintaining complete records of all complaints processed, including those dismissed.

The accused attorney is far better protected if a permanent record is maintained of a complaint dismissed as unfounded than he would be if the file pertaining to the complaint were to be destroyed. The existence of a record disclosing that the attorney's conduct has been investigated and found to be proper is readily available if the complainant later files another charge concerning the same incident. Without a record of the prior complaint, the accused attorney may be subjected to a new investigation duplicating the one already concluded. Maintenance of a permanent record of an unfounded complaint also will benefit the accused attorney who subsequently applies for membership in a bar association or for admission to practice in another jurisdiction. A standard inquiry made in connection with these applications is

whether the applicant has ever been the subject of a complaint and, if so, the disposition thereof. Frequently, the disciplinary agency is requested to confirm the attorney's representations concerning the disposition of a complaint made against him. The agency is unable to do so unless a record is available to it. The almost universal practice of checking with a state of prior admission whenever an attorney seeks to be admitted in a new jurisdiction was described by the president of a local bar association:

If the lawyer in question wants to practice in another state and wants to appear in another state, he may not be entitled to practice or even to try a case or appear in an appellate proceeding until the appropriate authority in that state has checked with the clerk of the court here, who immediately refers the matter to the . . . bar association.

Most of the disciplinary agencies that do not maintain permanent records use volunteers rather than professionals to process complaints. The continuity in practice and procedure provided by a professional staff is unavailable to them. A member of a court disciplinary commission noted that new volunteers, therefore, must learn from the experience of their predecessors:

I think it would be well to have a data bank of the types of conduct which we consider to be violative of the standards of honesty, justice and morality because one-third of the members of the committee, for example, will go off each year. There are always two-thirds left who will continue and will have some knowledge, but eventually we will get to a point where most of the members will not have any memory and no way in which they can find out what sort of conduct has in the past provoked recommendations for censure or other matters.

For that purpose, the maintenance of permanent records concerning complaints and the manner in which they have been processed is indispensable.

The complaint that is closed without affirmative action because of insufficient evidence may later be corroborated by a new complaint against the same attorney. Later corroboration is useless, however, unless a record of the first complaint has been maintained and is available.

The problems stemming from the failure to maintain permanent records were one of the most persistent themes of the testimony in the course of the regional hearings conducted by this Committee. A member of a state bar disciplinary agency described

the processing of subsequent complaints against the same attorney when no record of prior complaints exists:

Now, this I think is one of the problems . . . and the remedy, of course, is the obvious one, that records should be kept, even of dismissed complaints. The reason for that, of course, is that many complaints are dismissed . . . and these complaints, we think, are cumulative. We find lawyers who have repetitive complaints of the same nature, year after year, and while no one of them may be of sufficient substance to warrant punishment, in the aggregate they certainly do warrant punishment.

Even with the oldest member of the committee, in his third year, it is perfectly possible four years ago, five years ago, or six years ago there were many, many complaints. I think records ought to be kept.

The same conclusions were echoed by a state bar counsel:

It's absolutely impossible to properly evaluate a complaint against a lawyer unless you know at the time whether this is the first, fifth or twenty-fifth complaint against that lawyer, whether he has been disciplined privately or publicly. You cannot evaluate the complaint properly, and upon a finding of misconduct, it is impossible to properly determine what the penalty should be unless you know his past record. Some jurisdictions provide for that, some don't and that is something, as I say, that I consider to be absolutely basic.

A state court administrator advised us that a system of maintaining permanent records was instituted in his jurisdiction specifically to avoid these problems:

The primary consideration for keeping records of complaints was based on a decision that repetitive complaints against an attorney, none of which within themselves merit action, might indicate such a neglect of practice or pattern of conduct that some grievance committee action was necessary, and that the only method of discovering such a pattern of conduct would be by the keeping of records of all complaints filed.

Maintaining adequate records in states where disciplinary jurisdiction is vested in local disciplinary agencies may present some difficulties. Even if each agency maintains a permanent record of the complaints it processes, there is no assurance that a full record of an attorney's history will be readily available when a new complaint is received, since the attorney easily can move from one part of the state, where there is a record of a substantial number of complaints against him, to another part of the state, where he has no record. This was emphasized by a local bar association in a state with a large lawyer population in its response to the questionnaire circulated by this Committee:

Nor is there any one place or group with whom records of an admonition could be filed on a state wide basis, for example. We have

observed that frequently it is the lawyer who has indulged in some or several matters of minor misconduct who often seems to move from one county to another, or from this state to another state.

The chairman of a county disciplinary agency urged that permanent records of all complaints be maintained in one centralized location in order to avoid this problem:

My number one suggestion, and it has been made before, but I want to reiterate it, and that is, there should be some central filing place for grievances, either the court or the state bar association.

A central file of all complaints may not be feasible, however, in states with large urban areas where local disciplinary agencies receive and process a large number of complaints, because the process of forwarding records of closed complaints to the central file and requesting records of closed complaints when necessary, would result in an impossible administrative burden. A solution to the problem in these larger states can be provided as part of the implementation of periodic registration of all attorneys, elsewhere discussed. Thus, whenever an attorney files a registration statement indicating that he has moved from one local disciplinary jurisdiction to another, a copy of such registration statement could be furnished to the disciplinary agency in the new jurisdiction so that its records would contain the information necessary to locate the attorney's prior record, if any, in the event a new complaint against him is received.

Problem 13

Processing of complaints involving material allegations that also are the subject of pending civil or criminal proceedings.

DIMENSION

Many disciplinary agencies have no clear policy concerning the handling of complaints involving material allegations that also are the subject of pending civil or criminal proceedings. Florida has a court rule (Rule 11.02(3)(p)) specifically authorizing the prosecution of a disciplinary proceeding although related criminal charges are pending. The Board of Governors of the Florida Bar is given discretion, however, to withhold prosecution of a disciplinary proceeding pending the outcome of a criminal case if the board believes that "prosecution thereof might tend to prejudice the accused attorney in his defense or the State in the prosecution of the criminal proceedings." It will be noted that even this rule contemplates a case-by-case disposition rather than a comprehensive approach to the problem.

RECOMMENDATION

A court rule providing that disciplinary proceedings be deferred until the determination of pending criminal or civil litigation involving substantially similar material allegations, provided that the respondent-attorney proceeds with reasonable dispatch to insure the prompt prosecution and conclusion of the pending litigation.

DISCUSSION

The prompt disposition of complaints alleging attorney misconduct is an essential element of effective enforcement. Unwarranted delay may deny to the innocent attorney a prompt dismissal of an unfounded accusation, or it may expose the public unnecessarily to continued misconduct. Practices or procedures that increase the delay prior to disposition of a complaint should be avoided wherever possible. On the other hand, the generally desirable policy of avoiding delay should not result in practices or procedures that may cause injustice.

Disciplinary agencies often receive complaints involving allegations that also are the subject of civil or criminal litigation. While deferring action on these complaints until the litigation is concluded results in delay, disposition of the complaint without

awaiting the outcome of the pending litigation raises several substantial problems.

First, whenever two tribunals simultaneously consider the same factual situation, there is always the possibility that they will reach inconsistent results. If that occurs, respect for the integrity of the administration of justice tends to be lowered. For instance, a complainant simultaneously may file a complaint against an attorney alleging conversion and institute a civil proceeding against the attorney to recover the funds allegedly converted. If the complaint is entertained and processed without awaiting the outcome of the civil suit, the possibility exists that the charge of misconduct against the attorney may be dismissed by the disciplinary agency while the complainant recovers a verdict in the lawsuit. The potential for incongruous results is even greater when the related litigation is criminal in nature. In this situation, the attorney-defendant may be found guilty beyond a reasonable doubt in the criminal trial and acquitted in the disciplinary proceeding, even though a lesser burden of proof is required in the latter.

Second, disposition of the disciplinary proceeding while related civil or criminal litigation is pending may prejudice the outcome of the related litigation. If the attorney-defendant is disciplined for the very conduct that is the subject of the pending litigation and he thereafter testifies in the course of the litigation, the credibility of his testimony will be judged as that of a disciplined attorney. Moreover, a jury might be asked to resolve the ultimate issue in the litigation knowing that the attorney's peers had decided the same issue against him. If the related litigation is a criminal case, the finding in the disciplinary proceeding, as a practical matter, may result in the attorney's subsequent conviction, thereby substituting the lesser standard of proof necessary in the disciplinary proceeding for the standard of beyond a reasonable doubt required in the criminal case. The probability that the charges will be sustained in the disciplinary proceeding is, moreover, increased if related criminal litigation is pending, because the attorney-defendant might want to rely on his privilege against self-incrimination in the disciplinary proceeding to avoid the use of his testimony in the criminal prosecution, thereby virtually permitting the disciplinary proceeding to be decided by default.

REPORT ON DISCIPLINARY ENFORCEMENT

The president of a state bar described the dilemma of the attorney-defendant who simultaneously faces a disciplinary proceeding and a criminal investigation predicated on substantially the same facts:

In most cases, it involves the commission of a crime. We have felt when evidence of this kind came to us that we should forbear any disciplinary investigation until such time as the law enforcement officers have the opportunity to prosecute, or at least to determine that they will not prosecute, for the obvious reason that if a man is called before a disciplinary committee and he refuses to say anything, that his silence may, in a sense, be regarded as a sort of quasi admission of his involvement, and therefore is prejudiced in disciplinary proceedings. If he goes ahead and spills the beans, the transcript may be used subsequently in a criminal proceeding.

These potential consequences may well render unconstitutional the disposition of the disciplinary proceeding while a related criminal case is pending. The former chairman of a state disciplinary commission testified that the policy in his jurisdiction of deferring disciplinary proceedings until related criminal cases were concluded was predicated on a concern for the constitutional implications involved:

Our own court . . . has taken the position that these disciplinary proceedings would be held in suspension until the disposition of the criminal case. Not on the theory that you were trying to let the attorney off free, but there was a constitutional question here, and that you could not very well bring the attorney before a disciplinary body and put him under oath and expect him to tell the whole facts, all of the facts of the transactions involved, while the criminal charges were hanging over his head.

Finally, prosecution of a disciplinary proceeding while related litigation is pending also may prejudice that litigation indirectly. Identical evidence, relevant in both proceedings and required for use in the disciplinary proceeding, may not be immediately available for purposes of the pending litigation, and it may have to be deferred. Pending litigation against an attorney also may be prejudiced by the premature disclosure of evidence in a disciplinary proceeding or the creation of a stenographic record of a vital witness's testimony, on which an attack may be predicated because of minor inconsistencies. Of course, these factors also can prejudice the disciplinary proceeding if the related litigation is tried first. However, the circumstances in which this can occur are much narrower since many jurisdictions provide by statute or court rule that a criminal conviction is conclusive for purposes of a subsequent disciplinary proceeding. We are recommending else-

where that such a provision be implemented by rule of court in every jurisdiction.

These considerations justify a general policy of deferring the disposition of a disciplinary proceeding while related criminal or civil litigation is pending. In adhering to this policy, however, the disciplinary agency must be careful to guard against the possibility that the pending litigation will be used by the accused attorney to postpone indefinitely the disposition of the complaint against him. It occasionally happens that the prosecution of a pending criminal or civil case is discontinued for all practical purposes without an actual order of dismissal being entered. Deferring the disposition of a disciplinary proceeding under these circumstances is unwarranted and should not be tolerated.

The disciplinary agency cannot be expected to follow the progress of all litigation that may be related to a complaint and should not attempt to do so. Complaints of a minor nature related to pending civil litigation should be closed, and the complainant advised that he may again communicate with the disciplinary agency when the litigation is concluded. On the other hand, the status of all criminal cases pending against attorneys, as well as civil cases involving allegations of substantial attorney misconduct, should be followed carefully by the disciplinary agency in order to assure that there is no unreasonable delay.

Relatively prompt disposition of criminal cases involving attorney-defendants usually can be obtained if the disciplinary agency communicates with the prosecuting law enforcement agency and requests cooperation. Reasonably prompt disposition of pending civil litigation can be obtained by requiring the respondent-attorney to inform the disciplinary agency periodically concerning the status of such litigation and advising him that if he fails to exercise the procedural remedies available to him as a party in the civil litigation to assure a prompt trial, thereby permitting the litigation to be unreasonably delayed, the disciplinary proceeding will no longer be held in abeyance but promptly prosecuted.

Problem 14

Absence of subpoena power in the disciplinary agency.

DIMENSION

Subpoena power is recognized widely as an essential element in disciplinary enforcement, and most states make it available to their disciplinary agencies. A few, however, still do not. Some nonintegrated states in which county or city disciplinary agencies retain jurisdiction fail to provide these local committees with subpoena power. Integrated bar states, in which the disciplinary structure is more centralized, usually authorize subpoena power for their disciplinary agencies.

RECOMMENDATION

A court rule giving statewide subpoena power under court supervision to every authorized disciplinary agency as well as to any attorney under investigation.

DISCUSSION

Subpoena power is essential to the disciplinary process. Without it, the investigation of misconduct complaints is limited to the evidence voluntarily produced. While it may be assumed that the complainant in most cases will cooperate in an investigation he has initiated, he often lacks precise information, much less proof, concerning the actual nature of the alleged misconduct, particularly if the complaint is prompted by the attorney's failure to keep the complainant advised of the status of the matter in which the attorney represented him.

The accused attorney, on the other hand, while possessed of the relevant information, may be unwilling to cooperate. This situation was described by the former chairman of a state bar disciplinary agency:

Our other problem which I think is also important, is our lack of subpoena power. Twice during my membership, we have had an attorney against whom rather serious charges were made who was contacted and notified well in advance of a scheduled hearing and who just deliberately failed to show up. We have no way in which we can make him come or, if he comes, to produce any records that might be pertinent.

The secretary of a state bar association recalled a similar situation:

There is a lack of subpoena power. We have had a serious problem in the past year with a lawyer who allegedly overcharged substan-

tially. There is no way to compel him to get before the committee and give an answer as to what is going on.

Some courts having disciplinary jurisdiction consider the failure by an attorney to cooperate with a disciplinary agency as misconduct in and of itself. Where, however, the complaint involves conduct which might subject the attorney to criminal prosecution, such as conversion of the proceeds of a settlement or judgment, the attorney may invoke his constitutional privilege against self-incrimination and refuse to respond to the inquiries of the disciplinary agency. His refusal is constitutionally protected (*Spevack v. Klein*, 385 U.S. 511 (1967)).

If the complainant cannot furnish adequate evidence to substantiate his allegations and the accused attorney will not cooperate, the disciplinary agency must seek out independent evidence either corroborating the complaint or demonstrating that it is unwarranted. If this evidence consists of testimony of a potential witness who does not want to get involved or the records of a third party, such as a bank that will not disclose the transcripts of its depositors' accounts voluntarily, the disciplinary agency that has no subpoena power will be unable to dispose of the complaint on the merits. A disciplinary agency thus denied an indispensable investigatory tool can neither be effective nor command public confidence.

While it is readily apparent that the absence of subpoena power hampers the disciplinary agency in establishing misconduct on the part of an attorney under investigation, it is less obvious that the lack of the power also may deprive the accused attorney of the opportunity to establish his innocence. When the complainant has produced evidence sufficient to establish a prima facie case against the attorney, and the attorney's defense to the charges depends on the production of a document he cannot obtain voluntarily or the testimony of a reluctant witness, the absence of access to the subpoena power prejudices the accused attorney.

We recommend, therefore, that full subpoena power be made available to every authorized disciplinary agency as well as to every attorney who is the subject of investigation. While many states confer this power absolutely on the disciplinary agency, we recognize that there may be some concern over the potential abuses of unrestricted subpoena power. We suggest, therefore, that

REPORT ON DISCIPLINARY ENFORCEMENT

the power be limited, as in Missouri, by requiring that subpoenas be obtained by application to the court or agency having disciplinary jurisdiction.

Problem 15

No provision for compelling the testimony of witnesses and respondents in disciplinary proceedings by granting them immunity from criminal prosecution.

DIMENSION

The absence of authority to grant immunity from criminal prosecution did not present a significant problem in disciplinary enforcement until recently. Disciplinary agencies traditionally confined their activities to investigating specific complaints submitted to them, and the occasion rarely arose when a witness invoked his constitutional privilege against self-incrimination to refuse to answer inquiries in the course of a disciplinary proceeding. Complainants generally were anxious to give testimony necessary to sustain their allegations of attorney misconduct. However, disciplinary agencies now are increasingly recognizing the necessity for initiating investigations into areas of misconduct that are unlikely to generate complaints.

The reluctance of witnesses to testify has increased, particularly in the course of investigations into areas of practice involving solicitation, the filing of false special damage claims, immigration frauds, and other misconduct involving a conspiracy between the attorney and client from which the client derives substantial benefits and about which he is unlikely to complain. The client is reluctant to answer any questions concerning such matters since the truth may implicate him as well as the attorney. As a result, the client may rely on his constitutional privilege against self-incrimination to avoid disclosure of the misconduct.

The chief counsel of a continuing judicial inquiry into misconduct in the personal injury field testified:

We find that in going into the problems in depth of the particular sort of cases we are in, we often find witnesses that don't want to tell us what happened, because it happens to be a crime to accept money from a lawyer for solicitation, and there are other crimes involved in connection with this matter. So that we do run into a blank wall when it comes to certain of these witnesses. If we could grant immunity, we could solve that particular problem.

Similarly, there was little likelihood in the past that the accused attorney would invoke his constitutional privilege against self-incrimination in the course of a disciplinary proceeding, since under the doctrine of *Cohen v. Hurley*, 366 U.S. 117 (1961), to do so would itself have warranted disbarment. In

REPORT ON DISCIPLINARY ENFORCEMENT

January of 1967, however, the Supreme Court of the United States reversed *Cohen* in *Spevack v. Klein*, 385 U.S. 511 (1967), by holding that the mere invocation of the constitutional privilege against self-incrimination in the course of a disciplinary proceeding could not itself be the basis for charges of misconduct. Since the *Spevack* decision, some attorneys have invoked their constitutional privilege and refused to testify. Others undoubtedly will do so in the future.

Thus, the absence of a provision authorizing the conferring of immunity from criminal prosecution has begun to present difficulties in jurisdictions like New York, where judicial inquiries have been investigating practices in the negligence field without awaiting specific complaints. In fact, *Spevack* itself arose from such an investigation.

RECOMMENDATION

Adoption of appropriate procedures authorizing the conferring of immunity from criminal prosecution on witnesses and accused attorneys by the court having disciplinary jurisdiction on application by an authorized disciplinary agency, with due notice to local law enforcement agencies. We recognize that, unlike the other recommendations in this report, which may be implemented by courts exercising disciplinary jurisdiction either directly or by delegating authority to disciplinary agencies, this recommendation probably requires legislative authorization.

DISCUSSION

The conferring of immunity on a witness or accused attorney in the course of a disciplinary proceeding concerns the local law enforcement authorities, because it prevents the institution of a criminal prosecution based on any matter the witness or accused attorney may disclose in the course of his subsequent testimony. Any procedure authorizing immunity should require that local law enforcement authorities be served with a copy of the application requesting immunity and that the application itself be judicially determined. This will enable law enforcement authorities to assert any objection they may have to immunizing the witness in question and to have that objection judicially weighed against the necessity for granting immunity for purposes of the disciplinary proceeding.

The chief counsel to another judicial inquiry stated:

The immunity problem is a difficult one. I have given thought to it. I would not suggest that that authority be given to me, but I would suggest, and it would require legislation, that that authority be given to the court exercising disciplinary power, and hence, after I send in a report to the court they are then in a position to see whether or not this is the kind of situation that would warrant granting immunity to either a witness or a lawyer.

Also I think the district attorney would not like to be left out, and it would probably have to be done with the consent of the district attorney. With that I would agree.

Requests for conferring immunity on the accused attorney, as distinguished from a witness, should be made sparingly. In the first place, the issue of whether a disciplinary proceeding is essentially criminal or civil in nature is being litigated constantly, and it has not been determined finally. Should the courts ever determine that a disciplinary proceeding is essentially criminal, any immunity granted to the accused attorney will immunize him against the very disciplinary proceeding in which the immunity was granted. Second, whenever the disciplinary agency has developed sufficient independent evidence to establish a prima facie case, the accused attorney who refuses to testify on the ground that it will tend to incriminate him thereby virtually abandons any defense to the charges. Conferring immunity on that accused attorney, therefore, is not only unnecessary but will enable him to interpose a defense while escaping any criminal prosecution which his conduct may warrant.

PROPOSED STATUTE

A statute providing procedures for conferring immunity in the course of a disciplinary proceeding should include the following provisions:

1. The power to confer immunity in the course of a disciplinary proceeding shall be vested in the court having disciplinary jurisdiction.
2. Any request that a witness or accused attorney be granted immunity shall be made upon formal application by an authorized disciplinary agency, a copy of which shall be served upon the local, state and federal law enforcement agencies having jurisdiction within a specified time prior to the return date of the application.
3. A copy of every order conferring immunity shall be served upon the law enforcement agency.

Problem 16

No informal admonitory procedures to dispose of matters involving minor misconduct.

DIMENSION

Disciplinary agencies must occasionally determine what action to take with respect to complaints involving instances of established minor misconduct. These may be, as examples, the failure of an attorney to keep his client advised of the status of the client's case and to respond to the client's communications or an isolated instance of neglect resulting in a delay in the prosecution of a client's case. These matters, while not sufficiently serious to warrant the institution of a formal disciplinary proceeding, should not be dismissed, because that might imply that the disciplinary agency condones the attorney's conduct. The president-elect of a state bar testified:

I feel—and I know of many cases that we have had—in which my own feelings are that the lawyer was wrong. I don't feel it is sufficient to go ahead and certify it to the board of bar commissioners and ask for a formal finding that the lawyer be disciplined before the supreme court. I don't think it is that strong. Yet, I feel that the lawyer should certainly be slapped on the wrist.

Nevertheless, there are many jurisdictions in which the institution of a formal disciplinary proceeding or dismissal of the complaint are the only alternatives available to the disciplinary agency because no provision is made for informal admonitions.

RECOMMENDATION

A court rule vesting admonitory power in all disciplinary agencies, after investigation of the complaint and receipt of the accused attorney's statement of position, such power to be subject to the accused attorney's right to request, within a specified period after he is given notice of an admonition, that a formal disciplinary proceeding be instituted against him so that the charges may be judicially determined. A confidential record of the admonition should be maintained permanently so that it is available in determining the extent of discipline to be imposed in the event other charges of misconduct are prosecuted against the attorney later.

DISCUSSION

The disciplinary agency that has no alternative but to dismiss a

complaint or prosecute a formal disciplinary proceeding will often decide to dismiss. Prosecution of a formal disciplinary proceeding predicated on an instance of minor misconduct is unduly harsh, wastes the agency's limited manpower and financial resources on relatively insignificant matters and, particularly in large urban areas, overburdens the court having disciplinary jurisdiction. The chairman of a local disciplinary agency in a state with a large attorney population testified:

There is still enough hesitation upon the part of a lot of the members of the local committees to bring charges on what I would describe generally as technical violations of the canons. They would not authorize the committee to file charges because of the fact that they think the offense is slight, we have to bring in three commissioners from all over the state to hear it, and we have to have a trial committee to present it. It is a costly operation. The court transcript on these operations runs anywhere from \$700 to \$1,000. It is a very costly procedure.

I think that if we had the ability to enforce or discipline lawyers at a local level, we could do better in this area.

The president of a local bar association added his observation about the problem:

The machinery by which professional discipline is enforced, I think, is more cumbersome than it ought to be, and is too large to take care of many smaller complaints that nevertheless require redress. In most jurisdictions, the matter must be handled by a superior court . . . Courts are busy today. This court is so busy that twelve judges from other districts are coming during this year to help out with the civil jury calendar. Just recently, this month, three such judges were present, trying cases for periods of six weeks each.

The dismissal of complaints involving minor misconduct, necessitated by the limited alternatives available to the disciplinary agency, interferes with effective disciplinary enforcement in several respects.

First, dismissal of a matter involving established minor misconduct subjects the profession to criticism by the public. The complainant who knows that the accused attorney has been guilty of misconduct but is unaware of the limited alternatives available to the disciplinary agency may conclude that the dismissal evidences the profession's disinterest in effectively policing its members. This point was illustrated in the following colloquy between a member of this Committee and the president-elect of a small state bar:

Question: How does that explain it to the members of the public who have made the complaint? A man comes in and makes a complaint. He knows that his lawyer has done wrong. It may not be

REPORT ON DISCIPLINARY ENFORCEMENT

serious enough to go to the court, but then in most cases where that choice is open only between dismissal and referral to the court, the complainant gets a letter back from the bar association saying that your case is without merit or your case has been dismissed.

Answer: Right. This is one problem that we have definitely had . . . because we can only write this complainant and say that we have investigated this charge and we feel there is no misconduct. He is mad as a hornet.

If an informal admonition were authorized, the complainant could be advised confidentially that his complaint had been substantiated and that, although formal charges of professional misconduct were not being instituted, a permanent record of the complaint was being maintained by the disciplinary agency for future reference. The president-elect indicated what would happen if such a practice were authorized in his jurisdiction:

From the standpoint of public relations, if we have the right to come and reprimand that lawyer and a copy of that was sent to the complainant, I think 90% of the complainants—at least 90%—would be satisfied.

Second, the accused attorney may misinterpret the dismissal of the complaint against him as an indication that the disciplinary agency is either ineffective or disinterested. Moreover, the deterrent effect of an informal admonition timely given is lost and the attorney may, consequently, later involve himself in more substantial misconduct that he might otherwise avoid.

Third, in those jurisdictions where no permanent record of dismissed complaints is maintained, dismissal may immunize the attorney guilty of repetitive acts of minor misconduct from substantial discipline. An isolated complaint of misconduct on the part of an attorney may be dismissed because, standing alone, it does not warrant the institution of a formal proceeding. If no record is kept of the dismissal, subsequent complaints of a similar nature against the same attorney will be treated as isolated acts of minor misconduct also, and they will be dismissed. If the disciplinary agency were authorized to dispose of these matters by informal admonition and a permanent record maintained, subsequent complaints against the same attorney evidencing a continuing course of minor misconduct might result in the institution of a formal proceeding. The president of a local disciplinary agency which exercises admonitory power testified:

A bar association censure is also important, if he gets in trouble again, because his record is reviewed by the grievance committee if he comes before it a second time.

Finally, the enthusiasm of the members of the disciplinary agency toward their responsibilities may be affected by the repeated frustration at finding themselves unable to dispose properly of matters involving minor misconduct because adequate alternatives are not available. One state bar made the following comment in its response to the questionnaire circulated by this Committee:

The major problem is the lack of statutory power of the state bar board of governors to impose meaningful sanctions. The procedure, while providing a maximum of due process (*i.e.*, delays), does not adequately protect the public. The procedure is too slow. The state bar board of governors by a two-thirds or three-quarter vote should be able to impose meaningful sanctions.

We recommend that every disciplinary agency be authorized to administer informal admonitions in disposing of complaints involving instances of minor misconduct. Since the ultimate disciplinary power must be vested in the court having disciplinary jurisdiction, the accused attorney should have the right to request, within a specified period after notice of the admonition, that a formal disciplinary proceeding be instituted against him to adjudicate the propriety of the conduct upon which the admonition is predicated. If the request were made, the admonition would be vacated and the proceeding determined by the court.

The effectiveness of admonitions in disposing of substantiated complaints of minor misconduct is reflected in the annual report of the Committee on Grievances of The Association of the Bar of the City of New York for the year 1968-1969. In that period, the following disciplinary action was taken against 210 attorneys:

Disbarred	13
Suspended	14
Censured	3
Committee admonitions after hearing	22
Administrative admonitions	158

Had the committee and its staff not had authority to admonish, the 180 matters disposed of by that means would either have been the subject of formal disciplinary proceedings, thereby unnecessarily inundating the court having disciplinary jurisdiction, or would have been dismissed although the attorney had engaged in misconduct.

A confidential record of every admonition should be maintained permanently for reference in the event further substan-

REPORT ON DISCIPLINARY ENFORCEMENT

tiated complaints against the attorney are received. The record of the prior admonition will then be available to the disciplinary agency to aid in it determining the disposition of the new complaint and, if a second complaint results in a formal disciplinary proceeding, for consideration by the court in determining what discipline should be imposed if the charge is sustained.

Problem 17

Treating serious misconduct complaints as private disputes between attorney and client.

DIMENSION

Complaints alleging that attorneys have violated their fiduciary relationship to clients and have converted funds are among the most serious matters considered by disciplinary agencies. Misconduct of this gravity undermines the integrity of the profession and demonstrates that the attorney is so lacking in character as to pose a threat to his future clients. Yet disciplinary agencies in many jurisdictions process these complaints as if they involved only private disputes between an attorney and his client. These agencies direct their primary attention to effecting restitution, and if the attorney restores the monies wrongfully appropriated, the matter is closed on the ground that it has been "adjusted." The chairman of a local disciplinary agency acknowledged that a policy of this nature is followed in his jurisdiction:

If a lawyer makes a settlement of an accident case and fails to account to his client for the proceeds, and it is a first offense, and the attorney is contrite and makes restitution with reasonable promptness, so the beneficiaries of the client are not financially harmed, and if the committee is convinced that it is a one-time affair and will not happen again, it is not difficult to enter a censure and dismiss the complaint.

Other jurisdictions, recognizing the broader public implications of serious misconduct by an attorney, have concluded that the policy of fostering restitution, useful as it may be to the individual complainant, fails to protect the general public from the malefactor and is inconsistent with effective disciplinary enforcement. These jurisdictions insist, either by practice or specific rule, that complaints be disposed of on their substantive merit regardless of whether restitution has been made.

RECOMMENDATION

A court rule providing that restitution shall not justify in and of itself the termination of a disciplinary investigation into alleged misconduct by an attorney.

DISCUSSION

The profession's self-policing role has several purposes, including disciplining the attorney guilty of misconduct, deterring future misconduct and protecting the public by removing from the roll of

attorneys those whose conduct has demonstrated that their continued practice may jeopardize the interests of clients or the public. The policy of adjusting complaints without formal charges if restitution is made is inconsistent with these purposes.

A justice of a state supreme court, who also serves as court administrator, testified:

It was agreed, for example, that the essential purpose of the grievance committee procedure is to remove from the practice of law attorneys who might harm the public and the courts and the committee should concentrate upon the performance of that function. Thus, it was decided that a committee does not discharge its obligation by simply permitting the withdrawal of the complaint when there has been an adjustment between the attorney and the complainant in instances where the committee finds that there has been unethical conduct.

The attorney who converts funds hardly can be said to be effectively disciplined if, when discovered, he is merely required to repay the funds to which he was not entitled. If that is the extent of his exposure, the attorney risks little by wrongfully appropriating client funds.

A policy of closing conversion cases if restitution is made does not serve as a deterrent. The attorney tempted to misappropriate funds is unlikely to be dissuaded by the knowledge that if he is caught all that will be required of him is repayment of the funds wrongfully taken.

The attorney who has gone beyond temptation and has converted funds obviously poses a threat to any future client and the public. The president of a state bar association noted that a policy of permitting an escape from discipline by making restitution does not adequately protect the public:

Now, there is another gray area—the situation where a lawyer has taken somebody else's funds and there is no question about it. It has been my experience in the ten or twelve years on this committee that there is usually a pattern and a course of conduct. It is not the first time that it has happened. There comes the question: should we allow it to happen again just because the money is put back? It is my feeling that our function should go further and the public should not be exposed to such an individual.

There comes a time when they rob Peter to pay Paul and, eventually, they can't find another Peter to rob. It seems to me that that is the weakness in the operation of most of our local bar associations. They give him a chance and give him a chance again and then, after two years, one finds that the five or six known instances are only a small part of the whole performance.

The very policy of closing the pending complaint if restitution is made may jeopardize other clients. The pressure of a threatened disciplinary proceeding if restitution is not made may cause the attorney to misappropriate funds of another client in order to escape that discipline.

The practice of encouraging restitution is justified occasionally by the argument that few victims of conversion would be reimbursed if no benefit accrued to the accused attorney who makes restitution. Moreover, it is argued, the subsequent disbarment of the attorney removes all of his sources of income and, therefore, even a civil judgment in favor of the complainant will be worthless. But there are other considerations that outweigh these arguments. First, a policy that benefits the individual complainant while exposing the public at large to substantial risks is inconsistent with the primary purpose of disciplinary enforcement—the maintenance of high standards in the profession and the protection of the public. Second, more and more client security funds are being established throughout the country to compensate the victims of attorney misconduct. These funds reimburse the client directly if reimbursement from the attorney cannot be obtained. Finally, it is not suggested that restitution be completely disregarded, only that it should not preclude discipline. It is entirely appropriate that restitution, particularly when made voluntarily before the misconduct is called to the attention of the disciplinary agency, be considered a mitigating factor in determining the extent of the discipline to be imposed. This policy provides some motivation for restitution.

It should be noted that the question whether restitution itself justifies the closing of a complaint without disciplinary action is not confined to cases involving conversion. The same question arises when an attorney accused of neglect resulting in a client's claim being barred by the statute of limitations makes payment to the client to compensate him for his loss, or when an attorney accused of gross overreaching refunds part of the fee. This was illustrated in the testimony of a chairman of the inquiry division of a state bar association disciplinary agency:

We had a case come in about two months ago where a lawyer charged \$15,000.00 to represent a lady in a divorce case. She paid \$7,500.00 of that and he was demanding the other \$7,500.00. And she came to us because she didn't know whether she had to pay the other \$7,500.00. One of our members thoroughly investigated the

REPORT ON DISCIPLINARY ENFORCEMENT

matter. He concluded in his judgment the services rendered were worth a maximum of \$3,000.00.

We talked it over and decided—and we have done this before—that if this man wanted to reduce his fee to that amount we would take no action. If he did not agree, we would go ahead and do what we felt we should; namely, file a complaint against him for overreaching that client.

This lawyer was represented by a lawyer in his negotiations with us. He was so anxious to reduce that fee to \$3,000.00 that it occurred just like that. Now there is no question whatever in our minds that this man overcharged that woman or attempted to overcharge her. And, incidentally, he was giving back \$4,500.00 and is happy to do it. His lawyer, a competent lawyer representing him and who is familiar with the consequences of the grievance prosecution, had so advised him to do it.

We are now dealing with a man who has attempted to overcharge a client by \$12,000. What can we do now? Should we drop it? Does it really make any difference that he got caught and gave the money back? Does that make him a more ethical lawyer? What is our responsibility and what kind of treatment would we get if we prosecuted that kind of case before the supreme court?

Problem 18

Inadequate procedures for accepting resignation from attorney under investigation.

DIMENSION

Procedures with respect to attorney resignations are not uniform (see Note, "Legal Profession—Resignation from the Bar Under Charges," 26 *Missouri Law Review* 90 (1961)). Some states, for example, Kentucky, refuse to accept a resignation while an investigation into allegations of misconduct is pending against the attorney. Other states, such as Alaska and Michigan, require that a formal complaint against the attorney be prepared and that he admit its allegations before he is permitted to resign. Still other states, such as Colorado and Washington, accept resignations while investigations of charges of misconduct are pending and require that the investigations be discontinued as soon as the attorney resigns. In these instances evidence of the misconduct that is readily available may not be perpetuated, thereby creating an inadequate record for reference in the event the attorney later seeks reinstatement.

RECOMMENDATION

A court rule authorizing the acceptance of the resignation of an attorney who is the subject of a pending misconduct complaint and the entry of a consent order disbarring the attorney, provided that the attorney acknowledges in writing that the material facts on which the complaint is predicated are true.

DISCUSSION

It is not unusual for an attorney against whom a complaint has been filed to offer his resignation from the bar in order to avoid the trauma and expense of a formal disciplinary proceeding he realizes he cannot successfully contest. Acceptance of a resignation under these circumstances is in the interest of the public and the disciplinary agency. The public is immediately protected from further misconduct by the attorney, who otherwise might continue to practice until a formal proceeding is concluded, a period of several years in some jurisdictions. The disciplinary agency is relieved of the time-consuming and expensive necessity of prosecuting a formal proceeding; the resources it conserves are available for use in other pending matters.

A problem arises, however, when the attorney who has

resigned later seeks reinstatement. The misconduct that prompted the resignation may have been so substantial that the public interest would not be well served by reinstating him to practice. Aware that full disclosure of the misconduct that caused his resignation could block his reinstatement, the attorney may assert that in fact he was not guilty of the misconduct alleged at the time of his resignation but that he resigned because he either panicked or desired to spare his family the embarrassment of a disciplinary proceeding. The approach varies from case to case, of course, but its essential ingredient is a denial of the full implications of the misconduct under investigation at the time the resignation was submitted.

The disciplinary agency faced with this type of claim must demonstrate to the court having disciplinary jurisdiction that the attorney was guilty of the misconduct alleged against him and that he is unfit to resume practice. However, marshaling the necessary evidence at the time a motion for reinstatement is made may be impossible. Years may have passed since the attorney resigned, and the whereabouts of necessary witnesses may be unknown. They may have died. Evidence available at the time the attorney resigned, but which was not pursued since there did not appear to be any need for it at the time, may no longer be available.

A member of a state bar disciplinary agency noted that whenever the disciplinary agency is thus unable to marshal the evidence necessary to demonstrate the true scope of the attorney's misconduct, a miscarriage of justice is made possible:

Under our rule as it now stands, once the resignation is accepted, any investigation conducted by the board is to be terminated at that time unless it is directed by the courts that we continue. We now, however, are beginning to reap the other side of this; that is, we are getting the applications for reinstatement. The net result is that on some of these applications for reinstatement we don't really have enough information to make an accurate or good determination in regard to what should be done. We find now that there are people who, when they see they are going to be charged with offenses that are quite likely to result in permanent disbarment, will quickly come in with a letter of resignation in hopes that they will then chop off the investigation and close the records.

Now once the record is closed, they then may wait two or three years and come back and apply for reinstatement. Well, at that time we must place ourselves back in the position we would have been in two or three years before and say, "What would we have done with this offense had we taken it all the way?" And if we haven't had a very complete investigation, we are stymied.

The possibility that an attorney who has committed serious misconduct may be able to avoid the marshaling of evidence against him by resigning, and may thereafter seek reinstatement when the evidence is no longer available, poses such a serious problem that some states simply will not accept a resignation while a complaint is pending. A formal proceeding is tried to conclusion, and the evidence in support of the complaint is perpetuated. The problem of successfully opposing a later motion for reinstatement is thereby avoided, but the prompt protection of the public and conservation of the disciplinary agency's time, effort and resources are sacrificed.

Some states attempt to resolve this problem by authorizing the disciplinary agency to withhold the submission of a resignation until the disciplinary agency is satisfied that its records contain enough evidence to document the full scope of the misconduct. While this facilitates the acceptance of the resignation before a formal proceeding is tried to conclusion, substantial delay may still ensue.

A more satisfactory solution to the dilemma has been developed in New York City. The attorney who wishes to resign while a complaint is pending against him may do so, but only on condition that he file an affidavit with the court having disciplinary jurisdiction specifically stating (1) that his resignation is freely and voluntarily given, (2) that he is not being coerced or intimidated and is fully aware of the implications of his resignation, (3) that he knows that he is the subject of an investigation involving allegations of stated misconduct, (4) that he admits the allegations of the pending complaint, (5) and that his resignation is submitted because he knows that if charges based on that complaint were brought against him he could not defend himself successfully against them. This affidavit, of course, is always available in the event that the attorney later moves for reinstatement. The attorney also is requested to disclose the other jurisdictions in which he is admitted, and those jurisdictions are notified of his disbarment on consent.

The New York procedure makes it possible to obtain the advantages of the attorney's prompt resignation while avoiding the potential difficulties flowing from the failure to marshal the available evidence because no formal disciplinary proceeding has been instituted. The necessity for some procedure of this kind was emphasized by the first vice president of a state bar:

REPORT ON DISCIPLINARY ENFORCEMENT

We need to make specific recommendations for allowing, for example, the attorney against whom the charges are overwhelming, to consent to his disbarment. Obviously, there are going to have to be safeguards so six months or two years later he doesn't ask to be reinstated and the evidence is gone. But in certain cases, where there is really no contest, you go through the mill for one or two years. He knows he is going to be disbarred; he has no defense. During this period of time, he is allowed to continue practicing.

The proposed rule outlined later is adapted from the New York experience. It should be noted that provision is made that the required affidavit be sealed and its contents disclosed only on permission granted by the court having disciplinary jurisdiction. On the other hand, the fact of the attorney's resignation should be published in the same manner as a disbarment after hearings. This is necessary in order to make the public aware that the attorney's misconduct has not been ignored by the profession and to notify those who may have professional relationships with the attorney, such as insurance carriers and other attorneys, that he can no longer engage in the practice of law.

In addition, the order entered on a resignation while an investigation is pending should recite that the attorney is being disbarred on consent. This is necessary in order to distinguish the resignation submitted in the face of allegations of misconduct from one submitted for other reasons (see *Gresham v. Superior Court*, 44 Cal. App. 2d 664 (1941)). Some courts, cognizant of the fact that a resignation does not necessarily connote misconduct, refuse to accept it once a disciplinary investigation has been commenced on the theory that the submission of the resignation is no more than an attempt to evade the court's disciplinary power (Annotation, 54 A.L.R. 2d 1280). The use of the term "disbarred on consent" should avoid this problem.

Distinguishing a resignation in the face of an investigation into allegations of misconduct by the term "disbarred on consent" is also important for purposes of clearly notifying other jurisdictions in which the attorney is admitted to practice that the disbarment on consent involved a matter of discipline that might warrant reciprocal disciplinary action in the other jurisdiction (see *Nolan v. Brawley*, 244 N.E. 2d 918 (Ind. 1969)).

PROPOSED RULE

A rule providing procedures for accepting attorney resignations should include the following provisions:

1. An attorney who is the subject of an investigation into

allegations of misconduct on his part may submit his resignation by submitting to the disciplinary agency conducting the investigation an affidavit stating that he desires to resign and that:

(a) His resignation is freely and voluntarily rendered; he is not being subjected to coercion or duress; and he is fully aware of the implications of submitting his resignation.

(b) He is aware that there is pending an investigation into allegations that he has been guilty of misconduct the nature of which he shall specifically set forth.

(c) He acknowledges that the material facts upon which the complaint is based are true.

(d) He submits his resignation because he knows that if charges were predicated on the misconduct under investigation he could not defend himself successfully against them.

2. On receipt of the required affidavit, the disciplinary agency shall file it with the court having disciplinary jurisdiction and the court shall enter an order disbaring the attorney on consent. The order shall be a matter of public record and reported to the National Discipline Data Bank.

3. The contents of an affidavit of an attorney filed in support of his resignation from the bar shall not be disclosed publicly or made available for use in any other proceeding, except on order of the court having disciplinary jurisdiction.

Problem 19

No provision for service by mail, publication or other means when respondent cannot be personally served.

DIMENSION

In the majority of states provisions exist for the institution of a disciplinary proceeding by personal service of the charges on the accused attorney within or without the state or, if personal service cannot be accomplished, either by sending a copy of the charges to the accused attorney's last known address or by newspaper publication of a notice that a formal proceeding has been instituted. A few jurisdictions report that they have no provision for substituted service of charges. These include Mississippi, Puerto Rico, Tennessee and Wyoming.

RECOMMENDATION

A court rule providing that in the event the accused attorney cannot be served personally with charges, a disciplinary proceeding may be instituted either by mailing a copy of the charges to the accused attorney at his last known address or by publishing a newspaper notice advising the accused attorney that charges have been filed against him.

The rule should provide that when the disciplinary proceeding is instituted by service by mail, the charges should be addressed to the following alternative locations, in order of preference: (1) in states requiring periodic registration of attorneys, the address designated by the accused attorney in his most recent registration statement; (2) the office address furnished by the accused attorney to the client whose complaint is the subject of the charges; (3) the last known office address; and (4) the last known residence address.

The rule should provide that when no specific address for the accused attorney is known, the disciplinary proceeding may be instituted by publishing a notice addressed to the accused attorney advising him that charges have been filed against him, the place where he may obtain a copy of the charges and the number of days he has to answer the charges, together with the place where the answer should be filed. This should be published in a newspaper of general circulation published in the community in which the alleged misconduct took place.

DISCUSSION

It is the usual practice of disciplinary agencies to communicate with the accused attorney whenever it receives a complaint which on its face alleges misconduct. The disposition of the complaint is based on the complainant's allegations, the statement of the accused attorney and any relevant evidence obtained.

If the accused attorney can demonstrate that the complainant's allegations are inaccurate, or if he furnishes an explanation showing that his conduct was proper, the complaint is dismissed. If the accused attorney cannot adequately explain his conduct or admits that he has been guilty of misconduct, the matter results in either the institution of a formal disciplinary proceeding or an informal admonition by the disciplinary agency, in those jurisdictions where those admonitions are authorized, depending upon the severity of the misconduct.

When the accused attorney cannot be located after the receipt of a complaint which on its face alleges misconduct, informal admonition is inappropriate. The complainant's allegations stand uncontradicted and, regardless of the seriousness of the misconduct involved, the disciplinary agency has no assurance that the accused attorney is prepared to see to it that there will be no recurrence, an essential consideration if the matter is to be terminated by informal admonition. Under these circumstances there is no alternative but to institute a formal disciplinary proceeding, because dismissal of the complaint would place the disciplinary agency in the untenable position of taking no action although the complaint alleges misconduct and the accused attorney has submitted no explanation. The necessity for instituting formal proceedings in order to protect the public when an attorney disappears after engaging in serious misconduct is even more evident.

The chairman of a state disciplinary commission reported that there were a number of attorneys in his jurisdiction who sought to avoid discipline by evading service of process:

The attorneys who are repeaters and on the borderline all the time are on the dodge. They know how to tell clients how to stay away from the sheriff. Now they are practicing that procedure themselves.

We have eleven attorneys under investigation who have disappeared. And unless we have some type of proceeding where we can get those attorneys in by warrant, summons or otherwise, we are going to have eleven people victimizing the public. Now, you say with them skipping and hiding out they can't carry on too effective a law

REPORT ON DISCIPLINARY ENFORCEMENT

practice. We are not interested in whether they are effectively carrying out a law practice. We are interested that they don't victimize any member of the public.

It is essential that there be some procedure by which a formal proceeding can be instituted against an accused attorney who cannot be personally served with the charges. In the absence of this procedure, an attorney guilty of misconduct in a nonintegrated bar state, where he is not required to file a registration statement periodically, might move to another part of the state where he is free to continue to practice and to engage in further misconduct.

The chief justice of a court having disciplinary jurisdiction noted that there was a tendency on the part of some attorneys who had engaged in serious misconduct to attempt to evade service of process:

I would also say that in some cases where a case finally gets to the supreme court the attorney pretty much knows that he is at the end of his rope and it becomes a bit difficult to serve anything upon him. We have found that in one of our cases. Perhaps you can help us in that area.

Intrastate movement to avoid the filing of formal charges is more difficult in an integrated bar state where the accused attorney must periodically file a registration statement. However, if the attorney is licensed to practice in more than one state and is guilty of acts of misconduct for which he can be prosecuted only by personal service of the charges, he may be able to evade personal service of process and thereby continue to practice by moving to one of the other states in which he is admitted.

The Supreme Court of Louisiana emphatically rejected the notion that an attorney could evade its disciplinary jurisdiction simply by leaving that state in *In re Craven*, 125 So. 591 (1929):

It is not to be tolerated for one moment that an attorney and counsellor at law may conduct himself so as apparently to call for his disbarment or suspension and defeat the proceeding, and still remain a member of the bar, but only nominally so, by leaving the state permanently before service of citation is had upon him. The practice of law in this state is not a right but a privilege, which may be taken away from the person to whom granted for cause. Once the privilege is granted, so long as it continues to exist, the person to whom it is granted, wherever he may be, is subject to the jurisdiction of this court, touching his right to continue to exercise the privilege in the state. The law does not sanction, nor was it ever contemplated, that the privilege of practicing in this jurisdiction, even where circumstances make it a nominal privilege, must be submitted to the courts of the state to which the one possessing the privilege has departed.

The proper court of this state alone has jurisdiction to decide whether the privilege granted shall continue to exist.

The proposed court rule for substituted service when the accused attorney cannot be personally served establishes an order of priority which requires that such service be accomplished by the available method most likely to reach the accused attorney and thereby provide him with actual notice of the charges pending against him.

Problem 20

Inadequate provisions for dealing with attorneys incapacitated by reason of mental illness, senility or addiction to drugs or intoxicants.

DIMENSION

The testimony before this Committee indicates that disciplinary agencies throughout the United States are becoming increasingly concerned with the problem of the attorney who is incapacitated by reason of mental illness, senility or addiction to drugs or intoxicants. A statement by the chairman of a local disciplinary agency in a large urban center is illustrative:

A second problem we have is this question of insanity, mental incompetence, chronic alcoholism. The lawyer has not violated any of the canons of ethics, he has gotten awfully close, close enough for the committee, at least, and we note he should not be practicing law because it's only going to be a matter of time before he is going to be disbarred or suspended.

As yet there is no real remedy that we have to cope with that situation. There should be, I submit to the members of this committee, some remedy which we as members of the bar have in dealing with that kind of problem.

A number of states have formulated specific procedures for suspending the attorney's right to practice during the period of disability. Most, however, are still in the process of determining how best to meet the problem.

RECOMMENDATION

A court rule authorizing indefinite suspension or transfer to inactive status of any attorney incapacitated by mental illness, senility or addiction to drugs or intoxicants until such time as the incapacity no longer exists.

DISCUSSION

Two factors probably are principally responsible for the profession's failure to deal adequately with the problem of incapacitated attorneys. First, the traditional concern of disciplinary agencies has been attorney misconduct, and an attorney who had not yet engaged in any active misconduct, although he was incapacitated, was considered outside the agency's jurisdiction. The chairman of a state bar association disciplinary agency explained:

We have for consideration another problem, and that involves a lawyer who is notoriously unfit to practice law, because of psychiatric

problems, senility, alcoholism, and we run into them once in a while. No offense may have been committed thus far, other than general incompetency, and we have no jurisdiction over that. I do not know what the answer is, but I think it is a problem that should be considered.

The counsel to a local disciplinary agency testified concerning this problem:

This state has no procedure for dealing with mentally disabled attorneys except in the context of a standard disciplinary proceeding. If charges of misconduct are preferred against an attorney, and in the course of a proceeding it is established that his conduct was due to an existing mental condition, the courts have entered orders of indefinite suspension authorizing an application for reinstatement upon proper proof of rehabilitation.

This procedure, however, is not wholly satisfactory. It does not touch the attorney who may be mentally disabled but has not yet engaged in misconduct and permits him to remain a danger to the public until that danger has materialized. Moreover, the institution of a standard disciplinary proceeding against an attorney alleged to be mentally disabled raises serious due process problems.

In many jurisdictions an attorney has been proceeded against for his misconduct without regard to the underlying disability. He has been disbarred, although the misconduct was the result of a condition beyond his control and there is the possibility of rehabilitation (see Annotation, 96 A.L.R. 2d 739).

The second factor responsible for the profession's delay in meeting the problem of the incapacitated attorney has been its reluctance to deprive brother attorneys, who often have no independent income or pension, of their means of earning a livelihood. This attitude was expressed by the past president of a state bar:

In the area of incompetency, I know of lawyers who are alcoholics; I know of lawyers who are too ill to practice; I know of lawyers who are senile; I know occasionally of a negligent lawyer. What do you do with a lawyer who has lost his marbles but needs the practice of law and the few clients that come in? What do you do with this lawyer? Do you take his license away when he is 65 years old?

Quite understandably, the profession has been particularly reluctant to take appropriate action when there was no evidence that the attorney had been guilty of misconduct. By contrast, the profession has been a vigorous advocate of effective measures to remove the disabled judge, with respect to whom there is usually no problem as to income. The president of a local bar association in one of the larger urban areas testified:

I would like to point out in the case of a member of the judiciary, he probably has retirement income assured, whereas, in the case of members of the bar, it is very likely just the reverse. You are going to force a man to retire. Are you also going to furnish him something on which to live during his retirement? It is this that lies behind the whole problem—depriving the man of his livelihood.

These inhibiting factors still exist, but they are being re-evaluated. The profession is beginning to realize that although the disciplinary agency was initially established to cope with attorney misconduct, its principal responsibility is to protect a public that is as threatened by the disabled attorney as by the malefactor. The hardship of taking away an attorney's livelihood because of a condition beyond his control simply cannot justify the continued exposure of the public to the danger represented by an attorney's disability.

That is not to say that the profession should concern itself only with removing the disabled attorney and should ignore the economic plight that may follow. To the contrary, a profession whose sense of responsibility prompts it to create security funds to reimburse those victimized by its members might well create a similar fund to protect those of its members who fall victim to illness.

PROPOSED RULE

Since an attorney who cannot properly handle his own affairs obviously is not fit to represent others, the court rule concerning the disabled attorney should provide for the suspension from practice of any attorney who because of mental infirmity or illness, or "because of addiction to intoxicants or drugs, is unable or habitually fails to perform his duties or undertakings competently, and is unable to practice law without danger to the interests of his clients and the public."

The following procedures should be considered in the formulation of such a rule:

1. Suspension for disability should be imposed automatically by the court having disciplinary jurisdiction upon the filing of a certificate indicating that the attorney either has been judicially declared incompetent or has been involuntarily committed to a mental hospital. In such instances, no further proceeding prior to suspension need be had, since there already has been a judicial determination that the attorney cannot safely be entrusted with his own affairs, much less those of his clients.

2. Whenever the disciplinary agency contends, in the absence of a judicial determination of incompetence or involuntary commitment, that an attorney is suffering from a disability that requires his suspension from practice, the matter should be determined in a proceeding substantially similar to that provided for in the jurisdiction whenever an attorney is charged with misconduct. Thus, the attorney should be served with the charge alleging his disability and should be afforded the opportunity to be confronted by the evidence against him, to cross-examine witnesses and to adduce evidence in his own behalf. In order to avoid any due process problem and in fairness to the attorney concerned, counsel should be appointed to represent him if he himself has not retained one.

3. It is, of course, possible that the attorney and not the disciplinary agency will raise the contention that the attorney is disabled. Thus, an attorney facing charges of misconduct may contend that he is suffering from a disability that makes it impossible for him to defend himself adequately. When such an admission of disability is made by the attorney, that fact should be certified immediately to the court having disciplinary jurisdiction and an order entered suspending the attorney for disability. Since a claim of disability may be fabricated to avoid the consequences of the pending misconduct charges, the matter should be remanded to the disciplinary agency for the institution of a proceeding to determine the existence of the alleged disability. If the disciplinary agency thereafter concludes that the disability in fact exists, no further proceeding in the court should be necessary and the attorney should remain suspended until and unless he is able to satisfy the requirements for reinstatement after suspension for disability. If the disciplinary agency concludes that the claim of disability was fabricated, it should report its conclusions, together with the reasons therefor, to the court having disciplinary jurisdiction, which should then make a final determination. If the court finds that the alleged disability does not exist, the previously pending disciplinary proceeding predicated on charges of misconduct should be resumed. Of course, any conventional disciplinary proceeding pending at the time an accused attorney is adjudged incompetent or is involuntarily committed to a mental institution should be continued.

4. In any proceeding in which the contention is made that the

attorney is now disabled or was disabled at the time of the conduct on which the proceeding is predicated, he should be required to submit to an examination by one or more physicians selected by the disciplinary agency or appointed by the court. This will guarantee the availability of all relevant evidence necessary to evaluate the claim of incompetency properly.

5. Whenever an attorney against whom charges of misconduct have been withheld or continued because of disability establishes that he has recovered, he should not be reinstated until the charges of misconduct have been disposed of. The relevance of the disability to the misconduct charged should be determined by the applicable facts and law. Thus, any disability unrelated to the misconduct should not excuse the misconduct automatically. On the other hand, misconduct resulting from disability should not result automatically in denial of reinstatement.

6. Whenever an attorney who has been suspended for disability moves for reinstatement, he should bear the burden of proof to establish that the disability no longer exists and that he can be permitted to resume the practice of law without endangering his clients or the public.

7. Whenever an attorney who has been suspended for disability applies for reinstatement, he should be required to submit to an examination by one or more physicians selected by the disciplinary agency or appointed by the court.

8. A claim of disability by the respondent in a disciplinary proceeding or the filing of a motion for reinstatement by an attorney suspended for disability should be deemed to constitute a waiver of any doctor-patient privilege existing between the attorney and any doctor or hospital that has treated him during the period of alleged disability, and the attorney should be required to disclose the name of every doctor and hospital by whom he has been treated during such disability or since his suspension.

9. Motions for reinstatement by an attorney suspended for disability should not be entertained more frequently than once a year. This provision is necessary to protect the court having disciplinary jurisdiction from being inundated by motions for reinstatement filed by mentally disabled attorneys.

10. Although the public needs as much protection from the disabled attorney as it does from the attorney guilty of misconduct, suspension from practice for medical reasons must be clearly

distinguished from suspension for wrongdoing. The attorney who is ill should not be required to suffer the stigma of conventional discipline. The order removing the disabled attorney from practice should indicate clearly that the suspension is for medical rather than disciplinary reasons. This can be accomplished by the terminology "suspended on grounds of medical disability" or "transferred to inactive status" in referring to the removal.

Rule 603.15 of the New York Supreme Court, Appellate Division, First Department, which was adopted recently, substantially incorporates these recommendations.

Problem 21

Inadequate provisions for reciprocal action when an attorney disciplined in one jurisdiction is admitted to practice in other jurisdictions.

DIMENSION

When an attorney admitted to practice in several jurisdictions is disciplined in one of them, his license in the other is not affected automatically. A separate disciplinary proceeding in each jurisdiction in which the attorney is admitted is required.

Several jurisdictions, among them Florida, provide by rule of court that the findings in a disciplinary proceeding in another jurisdiction that a local attorney has been guilty of misconduct shall be conclusive for purposes of any disciplinary proceeding instituted in that jurisdiction. Other states have concluded that a judgment of a sister state imposing discipline must be given effect locally under the provisions of the full faith and credit clause of the Federal Constitution or through the principles of comity (*In re Van Bever*, 55 Ariz. 368 (1940); *In re Leverson*, 195 Minn. 42 (1935); *Copren v. State Bar*, 64 Nev. 364 (1947); *In re Brown*, 60 S.D. 628 (1932); *State Board of Law Examiners v. Brown*, 53 Wyo. 42 (1938); *In re Clay*, 261 S.W. 2d 301 (Ky. 1953); *In re Veach*, 365 Mo. 776 (1956)). Most jurisdictions, however, do not appear to have considered the issue and have no provision concerning the effect to be given to discipline imposed on a member of their bar by another jurisdiction.

The relatively small number of jurisdictions that have found it necessary to face this problem is accounted for in part by the absence of any method by which one jurisdiction is notified systematically that a member of its bar licensed in another jurisdiction has been the subject of disciplinary action there. This is a subject discussed in detail elsewhere. In addition, however, it seems likely that few cases based on discipline imposed in another jurisdiction have been instituted because the disciplinary authorities in many of the states that have no provision on the matter have assumed that they can discipline the attorney only by instituting their own proceeding based on the same charges and supported by the same evidence. Published reports of these relitigation cases are indistinguishable from reports of orthodox proceedings because they are predicated on evidence of misconduct rather than the findings in another jurisdiction. Consequent-

ly, it is not possible to determine the precise number of these cases by examining the reported decisions.

Relitigation of the same charges in every jurisdiction in which the attorney may be admitted to practice raises at least three problems.

First, the attorney who has been formally disciplined has been found guilty of misconduct reflecting upon his professional fitness. It may have been necessary to suspend or disbar him in order to protect the public. If that attorney is admitted to practice in other jurisdictions where no action can be taken against him until a new proceeding is instituted and concluded, the public in those jurisdictions is left unprotected. Any procedure that exposes innocent clients to harm by an attorney judicially determined to be unfit cannot be justified. Moreover, the spectacle of an attorney disbarred in one jurisdiction but permitted to practice elsewhere exposes the profession to criticism and undermines public confidence in the effectiveness of the disciplinary process.

Permitting the attorney disciplined in one jurisdiction to continue to practice in another is particularly incongruous when the jurisdictions concerned share the same geographical area. It sometimes happens, for example, that an attorney disciplined in a state court proceeding is also admitted to practice before the local federal court and continues to practice in the same locality following the imposition of discipline by the state court because prompt reciprocity is not afforded by the federal court. The past president of a state bar recalled one case in which the local federal court took no action against an attorney disbarred by the state court:

That has caused us a considerable amount of embarrassment, and I don't know just what should be done, because to the layman, when you say a lawyer is disbarred, you should be saying that he can't practice law, period.

Second, whenever the same evidence is weighed by two different fact-finding bodies, the possibility exists that they will reach opposite conclusions. An attorney found guilty of misconduct in one jurisdiction may, if a de novo proceeding is required to discipline him in other jurisdictions, be found innocent in another jurisdiction on the basis of the very same evidence. The law recognizes that the possibility of this inconsistent result cannot always be tolerated. For example, a prisoner facing sentence as a multiple felony offender may not contend that he was innocent of

the prior felony convictions. Nor is an applicant for admission to the bar entitled to retrial of a prior criminal conviction before the admitting authority. The maintenance of the high standards of the profession and the orderly administration of justice dictate that a disciplinary proceeding be afforded the same finality in other forums.

The problem is aggravated in those jurisdictions that require not only a de novo proceeding but also require that the existence of all disciplinary proceedings be kept confidential until and unless charges are sustained and discipline imposed. If a proceeding instituted in this kind of jurisdiction results in a finding that exonerates the attorney, even the fact that a disciplinary proceeding was instituted may not be disclosed. In such circumstances, the public will justifiably conclude that the local disciplinary authorities are not sufficiently concerned with the discipline imposed in the foreign jurisdiction even to inquire into the matter.

Third, requiring a de novo proceeding to be instituted against an attorney disciplined in a foreign jurisdiction results in substantial practical difficulties. The witnesses in the foreign jurisdiction may be reluctant to testify against the attorney again. Neither they nor the physical evidence in the foreign jurisdiction are subject to subpoena.

RECOMMENDATION

A court rule providing that discipline imposed against a member of the bar of the court by a foreign jurisdiction in which the attorney is also admitted shall be accorded reciprocity, provided that both the local disciplinary agency and the attorney are afforded the right to move for an order modifying the discipline imposed on the ground that the *record* of the proceeding resulting in the discipline discloses (1) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process, or (2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the local court having disciplinary jurisdiction could not consistently with its duty accept as final the conclusion on that subject, or (3) that the imposition of the same discipline by the local court having disciplinary jurisdiction would result in grave injustice, or (4) that the misconduct established has been held by the local court having disciplinary jurisdiction to

warrant *substantially* different discipline (see *Selling v. Radford*, 243 U.S. 46 (1917)).

DISCUSSION

The practice of law, reflecting the trend in all aspects of our modern life, is less and less confined to the boundaries of one state. The attorney admitted to practice in more than one jurisdiction is becoming more commonplace. A nationwide solution to the problem that arises when an attorney is disciplined by one of the jurisdictions in which he is admitted to practice is required.

In our judgment, the solution lies in a policy of reciprocity whereby discipline imposed in one jurisdiction is given automatic effect in all jurisdictions in which the attorney is admitted to practice. Under the specific rule that we propose, the local disciplinary agency, on receiving notice that one of its attorneys has been disciplined in another jurisdiction (the notice coming from the National Discipline Data Bank, elsewhere discussed), shall promptly obtain a certificate of the discipline from the court in which it was imposed and shall file the certificate with the local court having disciplinary jurisdiction. Upon receipt of the certificate, the court having disciplinary jurisdiction shall immediately enter an order imposing the identical discipline.

Within a specified time after the order is entered, either the local disciplinary agency or the attorney may move for an order modifying the discipline. This provision seems to us necessary in order to avoid a situation in which a foreign jurisdiction can effectively remove the local court's judicial power to fix the standards of conduct for its own bar by either holding that conduct otherwise permitted in the local jurisdiction constitutes misconduct or by prescribing a measure of discipline substantially different than that normally imposed by the local court for the identical conduct. For example, the foreign jurisdiction should not be able to take action which limits the discipline locally imposed to a six-month suspension for conduct that warrants disbarment in the judgment of the local court.

The availability of a procedure by which relief from discipline imposed by reciprocity can be sought is consistent with the principles of *Selling v. Radford*, *supra*, and *Theard v. United States*, 354 U.S. 278 (1957), and will make it possible for the federal courts to adopt the rule we propose. In *Theard* the

Supreme Court held that while discipline imposed by a state "brings title deeds of high respect," it was not conclusively binding on the federal courts, which, in substance, must satisfy themselves that the attorney's underlying conduct warranted the discipline imposed. The procedure we propose affords the federal courts the right to retain that authority. The fact that it can be exercised only after reciprocal discipline has been imposed is consistent with the practice of the Supreme Court of the United States with respect to the members of its own bar. In that court, if it is shown that an attorney has been disciplined in another jurisdiction, he is first suspended and then afforded the opportunity to show good cause why he should not be disbarred. The public thereby is immediately protected.

It should be noted that the proposed procedure does not permit relitigation of the findings of fact by the foreign jurisdiction. These are deemed conclusive for purposes of the local proceeding, and this removes the possibility of inconsistent findings.

Petitions for reinstatement by the attorney disciplined in several jurisdictions as the result of reciprocity should be considered independently and determined by the local court in each jurisdiction, according to its own standards in such matters. While substantial uniformity is desirable and may occur, we recognize the paramount importance of permitting the local court to determine ultimately the circumstances under which an attorney will be readmitted to practice in its jurisdiction.

A collateral problem is the effect to be given discipline imposed in a foreign jurisdiction but under appeal. Here, too, we recommend reciprocity. If discipline has been stayed pending an appeal in the foreign jurisdiction, and only in that event, it should be stayed locally. Otherwise, an incongruous situation could result wherein the discipline is deferred in the state of original jurisdiction but is in effect in the state in which it is imposed derivatively.

We are aware that our proposal for reciprocal discipline may not be received enthusiastically. There will be those who argue that implementation of the proposal abandons the locally admitted attorney to the whims and caprice of the disciplinary authority in another jurisdiction. These attitudes, while understandable, are unrealistic, for they not only ignore the strong considerations favoring the policy of reciprocity but are predi-

cated on a nonexistent danger. As this report reflects, no one familiar with disciplinary enforcement in the United States can possibly reach the conclusion that there are jurisdictions that impose arbitrary or unusually harsh discipline. To the contrary, the problem facing the profession stems from excessive leniency.

PROPOSED RULE

A rule providing for reciprocal discipline should include the following provisions:

1. Upon receipt of a certificate that an attorney admitted to practice locally has been disciplined in another jurisdiction, the court having disciplinary jurisdiction should immediately enter an order imposing the identical discipline.

2. In the event the discipline imposed in the other jurisdiction has been stayed there, the entry of an order providing for reciprocal discipline should be deferred until the stay expires.

3. The local disciplinary agency or the respondent-attorney shall be permitted to make a motion in the court having disciplinary jurisdiction within a specified time for an order modifying the reciprocal discipline on the ground that the *record* on which the discipline is predicated discloses (a) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process, or (b) there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the local court having disciplinary jurisdiction could not consistently with its duty accept as final the conclusion on that subject, or (c) that the imposition of the same discipline by the local court having disciplinary jurisdiction would result in grave injustice, or (d) that the misconduct established has been held by the local court having disciplinary jurisdiction to warrant *substantially* different discipline. In all other respects a final adjudication in another state that an attorney has been guilty of misconduct shall establish conclusively the misconduct for purposes of a disciplinary proceeding in this state.

Problem 22

No provision for suspension pending appeal of attorneys convicted of serious crimes (as defined on page 128) before the disciplinary proceeding based on the conviction is concluded.

DIMENSION

Failure to take prompt action against an attorney convicted of a crime permits him to continue to practice despite the conviction and undermines the public's confidence in the profession. Some jurisdictions, particularly those in the western United States whose procedure is patterned on that of California, provide for the immediate suspension of attorneys convicted of "crimes involving moral turpitude." That term, however, is difficult to define, historically means different things in different jurisdictions and itself causes substantial litigation to determine whether a particular crime is one "involving moral turpitude." Its use as a criterion in disciplinary enforcement may cause additional embarrassment to the profession. For example, it has been held that a conviction for the willful filing of false and fraudulent income tax returns does not necessarily involve moral turpitude for purposes of the California statute authorizing the imposition of discipline, *Re Hallinan*, 43 Cal. 2d 243 (1954). It is, therefore, possible under such a provision for an attorney who has been convicted of a crime for which he may be subjected to a substantial period of imprisonment and fine to remain in good standing at the bar and not subject to any professional discipline for his crime.

RECOMMENDATION

A court rule providing for suspension pending appeal of an attorney convicted of a serious crime (as defined on page 128) until final disposition of a disciplinary proceeding based on the conviction, with provisions for immediate reinstatement should the conviction be reversed.

DISCUSSION

Many jurisdictions do not initiate any disciplinary action against an attorney convicted of a crime until all appeals have been exhausted. Others take immediate action if the crime involved is a felony but not otherwise. Under these procedures the attorney continues to practice, often for a number of years after the conviction. It does not even matter whether the crime involves

conduct as an attorney; so long as an appeal is pending, the disciplinary process is stymied. One state bar counsel testified:

Under our state bar rules, if any person is convicted of a felony, disbarment is compulsory. This is not automatic. It means you've got to file a pleading before the appropriate court and call the court's attention to it. Once the facts are established and there is a conviction, disbarment is compulsory. The court has no discretion.

We have a continued discussion as to what constitutes conviction. Many committees say it must be a final conviction, and some of them go to extreme lengths. For instance, we had a situation where there was a man serving time in the penitentiary. At all times he had a writ of habeas corpus pending in some federal court. That committee took the attitude that that conviction was not final.

A similar situation was described by the president of a state bar:

We have a member of our bar who has been tried three times in the United States district court. I think one was a mistrial, a new trial and a conviction in the third trial of false swearing in a bankruptcy and concealing assets. His conviction was confirmed by the court of appeals. The mandate was stayed so that he could file a petition for certiorari in the Supreme Court of the United States, and he is at large. As far as I know he is continuing to swear and, I presume, falsely. I don't know.

We are deeply concerned with the fact that he is at large and that he is privileged to injure people that place their confidence and trust in him.

The public is unable to comprehend why an attorney convicted of stealing funds from a client can continue to handle client funds; or why an attorney convicted of securities fraud can continue to prepare and certify registration statements; or why an attorney convicted of filing a fraudulent income tax return can continue to prepare and file income tax returns for clients; or why an attorney convicted of conspiracy to suborn perjury can continue to try cases and present witnesses; or why an attorney convicted of bribing officials of an administrative agency can continue to practice before the very agency he has corrupted; or, indeed, why an attorney convicted of a serious crime of any nature can continue to hold himself out as an officer of the court obligated to uphold the law and to support the administration of justice. The chairman of a state bar association disciplinary agency explained:

A very prominent member of the bar was convicted, I think in early 1964, for embezzlement. He appealed ultimately to our court of last resort and certiorari was granted. Now, that man is practicing law. And, in fact, arguing cases before the court of appeals for five years now.

REPORT ON DISCIPLINARY ENFORCEMENT

Now, the public cannot understand that. The public simply cannot understand how a man who has been convicted of embezzling large sums of public monies can be practicing law and arguing cases, and in truth, arguing cases before the court of appeals, while his appeal there on these convictions is still pending.

The Deputy Commissioner of Internal Revenue provided another illustration:

First, take the case of the attorney who decided that he could be of greater assistance to his clients if he could assure them that their returns would not be audited, or if audited, that they would be closed without any tax change. So, for an extra fee, he bribed our agent, who in turn closed the cases requiring no change.

When we in the Internal Revenue Service became suspicious of the employee, we had inspectors quietly begin an investigation designed to establish the truth or falsity of the suspicions. Having obtained evidence of our own employee's involvement in the scheme, we confronted him with our evidence, obtained his removal from the service, and persuaded him to become a witness against the attorney. Almost at once, our own house was back in order, having dismissed the dishonest employee, but what of the dishonest attorney?

Our evidence was presented to the grand jury and he was indicted. Subsequently, after a period of time, his case came to trial, and he was convicted. He then filed an appeal to the court of appeals. This court affirmed the conviction. He filed an appeal for certiorari with the Supreme Court. The Supreme Court denied certiorari and he asked for a rehearing. The rehearing was denied, and eventually the trial court was directed to carry out the judgment of conviction.

Appeals, as you know, take time. This one took approximately three years from the date the judgment of conviction was entered until the appeals were exhausted. In the meantime, this attorney, convicted of bribery, was free to continue his practice before the Internal Revenue Service, I think to the detriment of the entire profession and to the consternation of the Service, who knew him for what he was—a convicted felon, capable of suborning a heretofore honest and trusted employee.

No single facet of disciplinary enforcement is more to blame for any lack of public confidence in the integrity of the bar than the policy that permits a convicted attorney to continue to practice while apparently enjoying immunity from discipline. The chairman of a state bar disciplinary agency testified:

We do not have automatic disbarment as you asked just now. Many times people are lenient towards those who are convicted. That is especially true in the area of income tax convictions. We have one attorney who served 18 months in one of our fine federal prisons; and nothing was ever done about his case. He is walking around practicing law and I have been unable to explain to the people in my district why that man is still practicing. Nothing was done about it. Some members of the governing body took the position that that was a civil matter and it was up to the federal government to collect the taxes and that the grievance committee was not going to go out and

undertake to disbar people. That had been established as the policy, and I don't know what to do about it, but it is the most difficult situation to explain to the lay public.

The effect that prompt action against attorneys convicted of serious crimes has on the profession's reputation was illustrated in the testimony of a former member of a state bar board governors:

We do have an automatic suspension on conviction of a crime. Our rule of court provides if it appears to the state supreme court that a member of the state bar has been convicted of a misdemeanor involving moral turpitude or a felony the supreme court must suspend such member summarily. This doesn't mean only convictions in this state; this means a conviction anywhere. Since the adoption of that policy, we are happy to relate that there has been a dearth, an absolute dearth, of public or news media complaints about lawyers practicing following a conviction.

What drove us to get this rule was our news media, who, being quite interested in the activities of the legal profession, made numerous complaints about letting lawyers continue to practice after being convicted of a crime.

The consequences of permitting the convicted attorney to continue to practice are not limited to the adverse effect upon the reputation of the profession. The clients of the convicted attorney suffer also. One who is unaware of the conviction might retain the attorney and unwittingly compromise his rights. Adversary counsel aware of the conviction may be reluctant to negotiate with the attorney, to enter on a settlement with him, to entrust him with an escrow fund, or to be associated with him of counsel. These are all circumstances totally unrelated to the merits of the client's cause, and they may impair it. Moreover, the conviction may be affirmed and the attorney sent to prison while the new client's claim is pending. The client will then be forced to employ new counsel, who will have to familiarize himself with the matter. This means more delay and considerable duplication of expense to the client.

There is a further threat to the convicted attorney's client. The attorney, aware that the conviction ultimately will result in his disbarment, and, assuming that he has little to lose, he may engage in serious misconduct toward his remaining clients for his own personal gain.

A policy which thus jeopardizes the rights of innocent clients cannot be justified. Quite incongruously, the profession generally recognizes these considerations in the procedures by which it processes conventional disciplinary proceedings. Discipline imposed in those proceedings is not deferred automatically because

the attorney seeks to appeal the adverse finding. We are unable to find any rationale for a procedure that affords greater protection to the attorney convicted under the reasonable doubt standard of the criminal procedure than it does to the attorney found guilty in a conventional disciplinary proceeding by a preponderance of the credible evidence, the standard of proof required in most jurisdictions.

We recommend that attorneys convicted of serious crimes be suspended immediately until a disciplinary proceeding based on the conviction is concluded and final discipline imposed. Our use of the term "serious crime" is a recognition that not every act denominated a crime so clearly reflects upon an attorney's fitness that suspension prior to imposition of discipline is warranted. The jurisdictions that now provide for immediate suspension of convicted attorneys distinguish crimes on the basis of whether they involve "moral turpitude." Experience indicates, however, that that term is too imprecise and has resulted in inconsistent decisions by courts as to whether particular crimes do or do not involve moral turpitude. We prefer to use "serious crime" and to define it in our proposed rule.

A necessary corollary to the prompt suspension of attorneys convicted of serious crimes is the implementation of a procedure whereby an attorney so suspended can be reinstated promptly should the conviction be reversed on appeal. Once the basis for suspension no longer exists, the suspension itself must be removed, lest injustice be perpetrated.

We envision the following procedure, which is predicated on present practice in California, except for the substitution of the term "serious crime" (together with its definition) in place of the term "crime involving moral turpitude."

Upon receipt of a certificate showing that an attorney has been convicted of a crime, the court having disciplinary jurisdiction shall determine whether the crime constitutes a "serious crime" as defined in the proposed rule. If the conviction is for a "serious crime," the court having disciplinary jurisdiction will enter immediately an order suspending the attorney pending the conclusion of a disciplinary proceeding to be instituted on the basis of the conviction and the imposition of final discipline.

At the same time the court having disciplinary jurisdiction either will enter an order instituting a disciplinary proceeding and appointing the local disciplinary agency to prosecute it (in

nonintegrated bar states) or will refer the matter to the state bar for the institution of a disciplinary proceeding (in integrated bar states). The disciplinary proceeding will not be brought to a hearing, at which the sole issue will be the measure of discipline to be imposed, until all appeals are concluded and the conviction is final.

Should the conviction be reversed on appeal while the attorney is suspended, the attorney need only file a certificate showing the reversal with the court having disciplinary jurisdiction, and it will forthwith enter an order reinstating him. That order will not affect the pending disciplinary proceeding, which continues until concluded.

If the conviction does not involve a serious crime, the court having disciplinary jurisdiction will not suspend the attorney immediately but will refer the certificate of conviction to the appropriate disciplinary agency for whatever action, including the institution of a disciplinary proceeding, it deems warranted. In addition, the court may, by appropriate rule, exclude minor offenses such as traffic infractions from this process.

Responsibility for forwarding the certificate of an attorney's conviction to the court having disciplinary jurisdiction will be placed on the clerks of courts of original criminal jurisdiction within the state and on the disciplinary agency.

Implementation of this proposed procedure will have the additional benefit of dramatically reducing delay before final disposition of disciplinary proceedings grounded on criminal convictions. Under present practice, the attorney prolongs the appeal for as long as he can since disciplinary action is deferred while the appeal is pending. Once the attorney is suspended immediately from practice until the subsequent disciplinary proceeding is concluded, and that proceeding is deferred while appeals are pending, it will be in the attorney's interest to expedite the appellate process.

Some representatives of disciplinary agencies that appeared before this Committee in the course of its regional hearings expressed some doubt as to the constitutionality of suspending a convicted attorney while an appeal is pending. We do not share these doubts. Due process is satisfied if the attorney is advised of the charges, witnesses against him are produced and subjected to cross-examination and he is given the right to adduce testimony and to testify in his own behalf. These rights are all accorded to

the attorney in the course of the prosecution. Moreover, while discipline may be imposed in a proceeding in which the standard of proof is only that which prevails in civil cases, guilt in the criminal case must be established by the far more exacting standard of proof beyond a reasonable doubt.

It is significant to note that the procedure adopted by the Supreme Court of the United States in supervising the members of its bar includes suspension pending the conclusion of a disciplinary proceeding and the imposition of final discipline. Revised Rule 8 of the rules of that court provides that:

Where it is shown to the court that any member of its bar has been disbarred from practice in any State, Territory, District, Commonwealth, or Possession, or has been guilty of conduct unbecoming a member of the bar of this court, he will be forthwith suspended from practice before this court. He will thereupon be afforded the opportunity to show good cause, within 40 days, why he should not be disbarred. Upon his response to the rule to show cause, or upon the expiration of the 40 days if no response is made, the court will enter an appropriate order; but no order of disbarment will be entered except with the concurrence of the majority of the justices participating.

PROPOSED RULE

A rule providing for immediate suspension of attorneys convicted of serious crimes should include the following provisions:

1. An attorney will be suspended automatically upon his conviction of a serious crime, whether the conviction resulted from a plea of guilty or nolo contendere or from a verdict after trial, and regardless of the pendency of an appeal, pending final disposition of a disciplinary proceeding to be commenced upon such conviction.

2. The term "serious crime" means a felony or any specified lesser crime a necessary element of which, as determined by the statute defining such crime, reflects upon the attorney's fitness. The lesser crimes to be specified in the rule should include, for example, interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file an income tax return, deceit, corruption, coercion, misappropriation, theft, or an attempt or conspiracy or solicitation of another to commit a "serious crime." (In recommending that the determination of whether the lesser crime reflects on the attorney's fitness be made from reference to the statute defining the crime, we are suggesting a significant variation from the California procedure. In that state

the determination of whether a crime is one involving moral turpitude is made in some instances by reference to the evidence in the criminal prosecution rather than solely on the basis of the provisions of the criminal statute. This can lead to the ironic situation in which one attorney may be disbarred and another not subject to any discipline, although both have been convicted of violation of the same criminal statute.)

3. An attorney will be reinstated immediately on the reversal of his conviction for a serious crime that has resulted in his automatic suspension, but the reinstatement will not terminate any disciplinary proceeding then pending against the attorney.

4. A certificate of the conviction of an attorney for any crime shall be conclusive evidence of his guilt of that crime in any disciplinary proceeding instituted against him and based on the conviction.

5. Upon the receipt of a certificate of conviction of an attorney of a serious crime, the court having disciplinary jurisdiction will not only suspend him from practice but also will immediately institute a disciplinary proceeding in which the sole issue to be determined will be the extent of the final discipline to be imposed, and the court will refer the matter to the appropriate disciplinary agency for that purpose, provided, that a disciplinary proceeding so instituted will not be brought to hearing until all appeals from the conviction are concluded.

6. Upon the receipt of a certificate of conviction of an attorney for a crime not constituting a serious crime, the court having disciplinary jurisdiction will refer the matter to the appropriate disciplinary agency for whatever action, including the institution of a disciplinary proceeding, it may deem appropriate, provided, however, that the court in its discretion will make no reference with respect to convictions for minor offenses.

7. The clerk of any court within the state in which an attorney is convicted will transmit a certificate of conviction to the court having disciplinary jurisdiction and to the appropriate disciplinary agency within a specified period after the conviction.

8. Any disciplinary agency, upon receiving information that an attorney admitted to practice in the state has been convicted of a crime in a court within that state, will determine whether the clerk of the court where the conviction occurred has forwarded a certificate of the conviction to the court having disciplinary jurisdiction. If the certificate has not been forwarded by the clerk

REPORT ON DISCIPLINARY ENFORCEMENT

or if the conviction occurred in another state, the disciplinary agency will obtain a certificate of the conviction and forward it.

Problem 23

No provision making conviction of crime conclusive evidence of guilt for purposes of the disciplinary proceeding based on the conviction.

DIMENSION

Some jurisdictions provide by court rule, statute or decision that the conviction of an attorney for a crime which on its face warrants discipline conclusively establishes the attorney's guilt and that this may not be relitigated in a disciplinary proceeding based on the conviction. Other jurisdictions, however, do not consider the conviction to be conclusive but only prima facie evidence of guilt, and they permit the attorney to adduce evidence attempting to establish his innocence in the subsequent disciplinary proceeding based on the conviction. (See, for example, *State v. O'Leary* 207 Wis. 297 (1932); *Matter of Donegan*, 282 N.Y. 285 (1940); Annotation, Conviction of crime involving moral turpitude as proof of grounds for disbarment where conviction is not itself an independent cause, 81 A.L.R. 1196.)

When the attorney is permitted to relitigate the issue of his guilt, the possibility exists that, although he was convicted on proof beyond a reasonable doubt in a criminal proceeding, he may be found not guilty in the subsequent disciplinary proceeding in which there is a lesser burden of proof. He may thereafter continue to practice despite his conviction. (See, for example, *Kentucky State Bar Association v. Brown*, 302 S.W. 2d 834 (1957), in which a disciplinary proceeding predicated on the attorney's conviction for income tax evasion was dismissed.) The public is unable to understand these apparently inconsistent results and concludes that the bar is not interested in maintaining high standards.

RECOMMENDATION

A court rule providing that the record of conviction constitutes conclusive evidence of the attorney's guilt of the crime charged for the purposes of any disciplinary proceeding based on the conviction. The only issue to be determined in the disciplinary proceeding is whether the crime warrants discipline and, if so, the extent of discipline to be imposed. In any proceeding to determine the extent of discipline to be imposed, the attorney may offer evidence of mitigating circumstances not inconsistent with the

essential elements of the crime as determined by the statute defining the crime.

DISCUSSION

The legal profession, having been granted the responsibility and privilege of disciplining its own ranks, must be careful to avoid any procedure that reflects upon its impartiality. Some of the public are ready to conclude at the slightest provocation that lawyers are more interested in "self-protection" than "self-policing." This has particular relevance to a disciplinary proceeding based on a criminal conviction, because the judgment of a segment of the public (the jury) can be readily compared to the judgment of a segment of the profession (the disciplinary authority). Any procedure involving this sensitive subject must be evaluated carefully.

An attorney is convicted of a crime by a jury of laymen who are persuaded that the evidence demonstrates guilt beyond a reasonable doubt. In most jurisdictions charges of misconduct are established against an attorney in a disciplinary proceeding by the findings of one or more lawyers (either members of a disciplinary agency, disciplinary commission or court) who are persuaded that the evidence demonstrates guilt on a burden of proof substantially less than beyond a reasonable doubt. In short, proof must be more convincing in the criminal case than in the disciplinary proceeding. That being so, it is difficult to justify the procedure in some jurisdictions that permits the convicted attorney to relitigate the issue of his guilt in a subsequent disciplinary proceeding by making the conviction only *prima facie*, rather than conclusive, evidence of guilt.

It is, of course, theoretically possible for two different triers of fact to reach different conclusions on the basis of the same evidence. But the law recognizes that the possibility of such inconsistent result cannot always be tolerated. For example, a prisoner facing sentence as a multiple felony offender may not contend that he was innocent of the prior felony convictions. Nor is an applicant for admission to the bar entitled to retrial of a prior conviction before the admitting authority. The maintenance of the high standards of the profession and the orderly administration of justice dictate that a criminal conviction be afforded a similar finality for purposes of a disciplinary proceeding.

Occasionally after the criminal conviction and the conclusion

of appellate litigation new evidence consistent with innocence is uncovered. But the disciplinary proceeding is not the proper forum in which to relitigate the attorney's guilt. There are available procedures by which the attorney may seek relief from the criminal court in which he was convicted. If he prevails there and is able to vacate the conviction, he can then seek appropriate relief from the disciplinary authority.

Permitting the attorney to relitigate his guilt can only undermine the integrity of the judicial system. Public confidence will be shaken by a court which dismisses a disciplinary proceeding against a convicted attorney by finding him not guilty. This is not the product of an unwarranted public prejudice; it is a very logical conclusion. One cannot rationally explain why a crime found in one forum to have been committed is found in another not to have occurred, particularly when the standard of proof in the latter is less than in the former.

The problem is not one of mere appearance. Very practical difficulties stand in the way of adequate relitigation of the criminal case in the context of a disciplinary proceeding. Witnesses may be reluctant to cooperate again; some may have died following the conclusion of the criminal case; others may be outside the disciplinary jurisdiction. In these circumstances, the accused attorney's testimony in support of his claim of innocence may stand uncontroverted. The crime also may involve complex questions of law requiring an expertise that a volunteer or staff attorney representing the disciplinary agency may not have. The chairman of a state bar association disciplinary agency illustrated some of the problems:

I represented the bar association in disbarment proceedings where the attorney had been convicted under the Smith Act. The case lasted two months, witnesses came here from all over the world to testify. He was convicted, and he appealed, and the conviction was affirmed. He applied for a writ of certiorari to the Supreme Court and that was denied.

The bar association moved in a couple of years later. When I got him in a disciplinary proceeding, I was met with the contention that I would have to now go ahead and prove that he was guilty of violation of the Smith Act. And at that time and now our statute is not at all clear on whether a conviction is conclusive. The trial court in that case held that the record of conviction in the federal court was conclusive on the trial court, and gave full faith and credit to the conviction.

The attorney then took it to the court of appeals. While they sustained the trial court, the language in the decision leaves up in the

REPORT ON DISCIPLINARY ENFORCEMENT

air the question as to whether the conviction is conclusive on him or is only prima facie.

It is perfectly ridiculous to think the bar association can go back and assemble those witnesses or anything else to prove violation of the Smith Act. So it seems to me that all states should provide that final conviction is conclusive in the disbarment proceedings.

The problem is aggravated in those jurisdictions that not only permit the attorney to relitigate his guilt but require that the existence of the disciplinary proceeding be kept confidential until and unless charges are sustained and discipline imposed. If a disciplinary proceeding in one of those jurisdictions results in a finding that exonerates the attorney, even the fact that a disciplinary proceeding was instituted may not be disclosed. The public may conclude that the bar was not sufficiently concerned enough about the attorney's conviction even to inquire into the matter.

The integrity of the profession simply cannot tolerate any proceeding that makes it possible for an attorney who stands convicted of a crime reflecting upon his fitness as an attorney to continue openly to engage in the practice of law without appropriate disciplinary action. A court rule providing that a criminal conviction shall be conclusive evidence of guilt for purposes of a disciplinary proceeding based on such conviction is essential to effective disciplinary enforcement. In order that the attorney cannot do indirectly what he is prohibited from doing directly, the rule specifically should limit the proof admissible in mitigation to that which is not inconsistent with the essential elements of the crime as determined by the statute defining the crime.

PROPOSED RULE

A rule providing that criminal convictions shall constitute conclusive proof of guilt in any subsequent disciplinary proceeding based on the conviction should include the following provisions:

1. The certificate of the conviction of an attorney shall be conclusive evidence of his guilt of the crime for which he has been convicted in any disciplinary proceeding instituted against him based on the conviction.

2. In any disciplinary proceeding based on an attorney's conviction for a crime, the sole issue to be determined shall be whether the crime warrants discipline and, if so, the extent thereof. In the course of any hearing conducted for that purpose,

the attorney may not offer evidence inconsistent with the essential elements of the crime for which he was convicted as determined by the statute defining the crime.

Problem 24

Permitting disciplinary proceedings to be tried by jury.

DIMENSION

Georgia, North Carolina and Texas permit jury trials in disciplinary proceedings. In Georgia and North Carolina the accused attorney may elect trial by jury. In Texas, on the other hand, formal disciplinary proceedings are tried by a jury as a matter of course. It should be noted, however, that only issues of fact are determined by the jury. Discipline is imposed by the trial judge.

RECOMMENDATION

Elimination of jury trial in disciplinary proceedings.

DISCUSSION

All but three jurisdictions now require that formal disciplinary proceedings against attorneys be tried by their peers. While Georgia permits the accused attorney to request a jury trial, no request ever had been made to May, 1967, when representatives of the Georgia Bar appeared before this Committee at its regional hearing in Miami. There have been requests for jury trials in North Carolina, but these seem to have been motivated primarily by the accused attorney's desire to delay the proceeding. This is made possible by the fact that disciplinary cases are not given priority, and if a jury trial is requested, they take their place in the regular order of civil cases and may not be reached for trial for some two years.

Under the rules of the State Bar of Texas, the disciplinary agency, if in its opinion the license of the accused attorney should be revoked or suspended for a period not exceeding three years, may obtain the accused attorney's consent, and the discipline agreed upon becomes the judgment of the district court of the county in which the accused attorney resides. Most disciplinary proceedings in Texas are terminated by these consents, cases resulting in trial by jury averaging less than one per year. The exceptionally high percentage of accused attorneys who subject themselves to substantial discipline by consent indicates a consensus that there is little to gain, and perhaps much to lose, by availing oneself of the right to trial by jury.

In order to evaluate charges of professional misconduct proper-

ly, the trier of fact should be familiar with the practices peculiar to the profession. Conduct involving, for example, complicated real estate transactions, conflicts of interest, advertising, and confidential communications cannot be evaluated readily by laymen totally unfamiliar with the concepts underlying the standards set forth in the Canons of Professional Ethics and Code of Professional Responsibility. Trial by a jury of laymen may mean that the accused attorney is judged by different standards than those the profession has required of him. This may inure as much to the accused attorney's benefit as to his detriment. For example, a jury of laymen unfamiliar with the abuses that necessitate the prohibition against improper solicitation may exhibit their hostility to a standard they do not understand by exonerating the accused attorney.

The possibility of a jury trial, which in fact is little availed of, serves only to delay and weaken effective disciplinary enforcement.

Problem 25

Inadequate provisions concerning public disclosure of pending disciplinary proceedings.

DIMENSION

Many states attempt to protect the reputation of an attorney accused of misconduct by directing that the existence of a disciplinary proceeding be kept confidential until a trial has been held, the charges have been found sustained and the record filed in the court having disciplinary jurisdiction. Other states go further and prohibit disclosure after the trial authority has found the charge sustained until the findings are sustained by the court having disciplinary jurisdiction and discipline has been imposed. These prohibitions against public disclosure of pending disciplinary proceedings usually are absolute and permit no deviation. No provision is made for disclosure of a pending disciplinary proceeding against an attorney whose misconduct is publicly known.

A few states have no special provisions on disclosure of pending disciplinary proceedings, and they are handled in the same manner as any other court case. Full public disclosure is permitted as soon as a formal complaint is filed even though no trial or hearing has been held. States that permit disclosure generally are those that provide for trial of the charges by one or more judges rather than by referees, trial committees or a disciplinary commission. In these states also the procedure concerning public disclosure of the pending disciplinary proceeding is usually undeviating. The pendency of charges predicated on allegations not yet substantiated is as freely disclosed as are charges predicated on convictions for a crime after proof beyond a reasonable doubt.

RECOMMENDATION

A court rule providing that the existence of a pending disciplinary proceeding shall be a matter of public record if the charges are based on a conviction for a crime or the respondent-attorney, following the filing of formal charges, requests public hearings, but otherwise shall be kept confidential until hearings have been held and the charges sustained by the trial authority.

DISCUSSION

Until proof has been adduced that an attorney has been guilty

of misconduct, a complaint against him is no more than an accusation. Disclosure of the existence of that accusation may itself result in irreparable harm to the attorney. His practice may be diminished, if not substantially destroyed, by the resulting lack of confidence of old and new clients, judges before whom he has to appear and fellow attorneys with whom he must negotiate. The potential damage of premature disclosure of the existence of allegations of misconduct was the subject of colloquy before this Committee between a member of a court disciplinary commission and the chief justice of a court having disciplinary jurisdiction in another state:

Member: But my point is that this complaint is not the last procedure that is followed. There are procedures after that in which evidence is taken.

Chief Justice: Yes.

Member: But the damage has been done to this man if he is acquitted because everybody knows he has had the disciplinary action filed against him.

Chief Justice: There has to be some risk in this procedure.

Member: There is no risk in our procedure. Nothing is mentioned until the finding is dictated by the supreme court. Our committee decision is not public. Nobody knows about it. There is no publicity of any kind until the supreme court finally says either he is going to be disbarred, he is going to be suspended or be given a public reprimand.

Unlike the civil service employee who is suspended while charges are under investigation and who can be reimbursed in full if the charges are subsequently found not sustained, the attorney never can recoup the financial loss caused by public disclosure of charges against him, even if he is subsequently exonerated. In fact, since later exoneration is never as newsworthy as the prior accusation, it is likely that the damage visited on him will continue even after the charges have been found not to have been sustained.

It is no answer to argue that prompt public disclosure of a pending disciplinary proceeding protects the public against the attorney who is engaged in misconduct. In the first place, that argument assumes that the attorney is guilty before guilt has been established. Second, that argument assumes that the burden of promptly protecting the public can be transferred properly from the disciplinary agency to the attorney accused. Prompt protection of the public from an attorney guilty of misconduct should indeed be a first priority, but it should be accomplished by the adoption of appropriate procedures to minimize the delay

between the institution of a formal proceeding and its determination rather than by perpetuation of procedures that may victimize an innocent attorney.

Nor is it any justification to argue that the disciplinary process involves such extensive procedures before a formal proceeding can be instituted that doubtful cases usually are weeded out. It is true that charges are sustained and discipline imposed in the great majority of formal proceedings instituted and that the possibility that an innocent attorney will be harmed by premature disclosure of the existence of the proceeding against him is remote. Nevertheless, our profession has never countenanced a procedure on the ground that it harms only a few who later establish their innocence. Whenever procedures that incorporate such a possibility have been advocated, the profession has taken the position that it is better that the guilty go unpunished than that the innocent be victimized. Surely the disciplinary process should not incorporate a procedure that is rejected in other contexts.

Moreover, the number of formal disciplinary proceedings that result in a finding that the charges have not been sustained is likely to increase. The present high percentage of formal proceedings in which charges are sustained and discipline imposed results largely from a lack of finances, staff and expertise, a lack that forces disciplinary agencies to prosecute only those complaints that can be established beyond a shadow of a doubt. The increasing concern in the profession for more effective disciplinary enforcement will result in a substantial increase in the resources available to the disciplinary agency and will enable it to seek a judicial determination of formal charges predicated upon allegations of serious misconduct even though substantial issues of fact are presented. This trend toward resolving more difficult cases rather than ignoring them is highly desirable. Nevertheless, it must be recognized that the increased concern with more doubtful cases will result in an increase in the number of cases that terminate in dismissal of the charges. Consequently, the need to withhold public disclosure of the pendency of proceedings involving allegations not yet established, in order to avoid injury to those later exonerated, becomes increasingly important.

These considerations do not apply when the pending disciplinary proceeding is based on an attorney's conviction of a crime, since his guilt of the underlying conduct already will have been established by a trial at which the burden of proof was higher than

that in the disciplinary proceeding. The conviction is already a matter of public record, and disclosure that the bar is instituting a disciplinary proceeding cannot do further harm. In fact, failure to disclose that the bar is taking action in these cases may result in irreparable harm to the profession as it creates the impression that nothing is being done about the convicted attorney and that the profession acquiesces in his continuing to practice.

The chairman of a state bar rules committee emphasized the desirability of public disclosure of pending disciplinary proceedings predicated upon attorney convictions:

One of the other problems that has given us a great deal of concern, and which will be involved in our recommendations for revision of the rule, is the problem of secrecy. I pointed out the problem we have where misconduct on the part of a lawyer results in public criminal proceedings. Yet under our secret grievance machinery the public is not made aware that the bar is doing anything in its disciplinary program. I think our revision of the rule might well waive that secrecy where the misconduct is, in fact, a matter of public knowledge through the pendency of criminal proceedings.

These considerations persuade us that pending disciplinary proceedings should be disclosed publicly when the charges are based on the attorney's conviction of a crime or, of course, when the attorney requests that any formal hearing be public, as the only valid basis for confidentiality is his protection, and he should be permitted to waive it. We further recommend that the policy of maintaining confidentiality until charges have been fully tried and sustained be maintained with respect to all other disciplinary proceedings.

It should be noted that the exception to the policy of confidentiality recommended with respect to proceedings based on a criminal conviction is consistent with the recommendation elsewhere made that attorneys convicted of "serious crimes" should be suspended publicly immediately upon conviction, pending final imposition of discipline at the conclusion of a disciplinary proceeding based on the conviction.

Finally, disciplinary authorities should be aware that maintaining confidentiality with respect to most pending disciplinary proceedings, as we recommend, makes it particularly essential that cases be expedited and delay minimized in order to avoid public criticism of the effectiveness of the disciplinary process. The consequences of extended delays were described by the chairman of a state bar association disciplinary agency:

REPORT ON DISCIPLINARY ENFORCEMENT

They say, "This fellow was reported to you two years ago and you haven't done the first thing." Well, of course, what they don't know is we have done not only the first thing, but we have got the thing pretty well wrapped up, but we can't say anything because the situation is confidential until it does get into the supreme court. So we are subject to a lot of unjustified criticism for apparent delay, which is not delay at all, at least not unreasonable delay.

Problem 26

Failure to publish the achievements of disciplinary agencies.

DIMENSION

Most disciplinary agencies deliberately discourage any publication of information concerning their activities, believing that the public image of the profession is damaged by a disclosure that attorney misconduct exists. The president of a large state bar spoke of this policy:

And, of course, we try to keep publicity concerning our disciplinary proceedings out of the newspapers because this gives lawyers a black eye and a bad image.

This policy denies the public information that would demonstrate the profession's concern for effective disciplinary enforcement and show the steps taken by the bar to maintain its integrity. The public's dissatisfaction with the effectiveness of the disciplinary system may be attributed in part to the inadequacy in information made available concerning the existence of disciplinary agencies, the services they render and their accomplishments.

RECOMMENDATION

Intensive efforts to educate the public and the profession concerning the work of disciplinary agencies and the services they render by widely publicizing the full scope of their activities.

DISCUSSION

Any effort to achieve greater public acceptance of the profession's role in administering discipline must begin by acknowledging reality. The public is aware that lawyers sometimes are guilty of misconduct and, in fact, probably suspects that guilt is far more extensive than it actually is. Efforts to foster public acceptance of a myth that there is no misconduct in the profession are not only useless but may expose the profession to ridicule as well. The route to encouraging public confidence in the disciplinary process lies in acknowledging the existence of attorney misconduct and showing the public the steps taken against it. A justice of a court having disciplinary jurisdiction explained:

For in the long run it is much more important to maintain our high professional standards than to suppress needed disciplinary action simply in an attempt to convince the American people that lawyers are all beyond reproach. To be sure, that would be no more realistic than the picture painted by those who would attempt to

REPORT ON DISCIPLINARY ENFORCEMENT

persuade our fellow citizens that all lawyers are to be regarded with distrust.

The dissemination and publication of relevant information concerning proceedings that result in the imposition of discipline serve the cause of effective enforcement. The secretary of a state bar association noted that the deterrent effect inherent in every disciplinary proceeding is directly proportionate to the number of practicing attorneys who are made aware of its existence:

There is a lack of publicity among lawyers as to what the professional conduct committee is doing or has done. It is almost a policy of the committee until recent years, at least, that these things should be handled without anybody knowing about them, especially the lawyers in the state, which seems to me to be a self-defeating attitude.

Similarly, the very effectiveness of discipline in a particular case may depend on widespread awareness that it has been imposed. The attorney who is engaged in misconduct serious enough to warrant disbarment may not hesitate to continue to practice after his license has been revoked. His ability to do so is increased if the fact of his disbarment has not been made public and no one is aware of it. One actual example well illustrates the point.

An attorney was disbarred for forging his clients' endorsements to several settlement checks issued by insurance carriers and converting the entire proceeds. The fact of his disbarment was not published. Later the attorney was able to settle the remaining negligence cases in which he had been retained at a fraction of their value, obtain settlement checks, forge the clients' endorsements and convert the proceeds. Had the insurance carriers and clients known of the attorney's disbarment, he would have been unable to negotiate a single settlement, much less get his hands on the proceeds. Thus, the failure to publish information concerning the discipline imposed rendered the disbarment virtually meaningless and unnecessarily exposed the attorney's remaining clients to further misconduct.

The chairman of a court disciplinary commission acknowledged the necessity for the wide dissemination of information concerning discipline in order that similar situations be avoided:

In the future, whenever there is a disbarment, we are going to ask the court to provide in the order that it be published in the law reports and in the bar journal, so that locally everybody will know about it. Because some of these people were suspended, and I am sure they just kept on practicing law.

It is clear, therefore, that widespread publication is an effective and vital tool in disciplinary enforcement. Several states, including California and Missouri, periodically publish lists of all attorneys formally disciplined, and the lists are disseminated to all state courts, federal courts, federal agencies and the United States Supreme Court.

Arrangements should be made to have relevant information concerning attorney discipline published in media likely to reach members of the profession and the public, including law journals, bar journals or newsletters and local newspapers of general circulation. Publication should not be limited to cases that result in formal disciplinary proceedings. Public and professional awareness of other aspects of the disciplinary agency's work also will foster confidence in the disciplinary process. The profession will be reassured by disclosure that the majority of complaints on investigation are found to be unwarranted. The public will be reassured by learning that misconduct of a minor nature is also of concern to the disciplinary agency, and that procedures exist for admonitions in those circumstances. Both the profession and the public will be reassured to know that the disciplinary agency seeks to improve relations between client and attorney by remedying minor client dissatisfactions not involving misconduct. In order that these less dramatic but highly important phases of the disciplinary agency's work be widely publicized, a periodic report detailing the full scope of the agency's activities should be prepared and disseminated to the public and professional news media.

General information concerning informal admonitions and private reprimands also should be widely disseminated, for it will offer guidance to the profession about the conduct with which the disciplinary agency is concerned. The chairman of a state bar disciplinary board stated his conclusion that a regular section in a periodical going to the profession describing conduct resulting in admonition, without disclosing the identity of the attorney concerned, was likely to have a substantial deterrent effect:

Our experience has indicated that the educational process could well be extended later on in professional life. For example, while we haven't made any studies or surveys or anything like that, we rather suspect that there is a good deal that goes on, for example, with respect to the handling of clients funds, which a good many of the practicing lawyers don't realize involve offenses that are subject to the disciplinary process. As a result of that, in the last year we have

REPORT ON DISCIPLINARY ENFORCEMENT

determined to publish in our state bar journal a summary of the nature of the offenses that come before the disciplinary board. Hopefully, the practicing attorneys will read them and become more aware of the importance of certain types of behavior.

There are other methods of publicizing the work of disciplinary agencies to promote deterrence of future misconduct. For example, arrangements can be made for representatives of the disciplinary agency to address students in local law schools concerning ethical standards, the function of the disciplinary agency and the importance of supporting more effective disciplinary enforcement. Discussions of ethical considerations and relevant disciplinary violations also can be included in continuing legal education courses on substantive subjects.

Problem 27

No provision for protecting clients when an attorney is disciplined, or when he disappears or dies while under investigation.

DIMENSION

If any attorney who engages in misconduct or suffers from a disability that renders him incapable of representing clients is removed from the rolls, the members of the public who might otherwise have retained the attorney are protected. But the attorney's removal from the practice may create substantial difficulties for his existing clients. The following colloquy between a member of this Committee and a state bar counsel demonstrates this:

Question: Suppose A is disbarred. How do you go about finding out what happens to his clients? Do you require him to give you a list of them, how do you accomplish that?

Answer: No, we do not.

Question: How do you know that they are advised, so that they can be protected against, for example, the running of the statute of limitations or defaults in pending litigation, and so forth?

Answer: Well, in the instances that I recall my office has written to most of the clients that we knew the attorney was representing that he was no longer a member of the bar and that they should seek other counsel if their case was still pending. Of course, in most cases, the attorney has spent maybe the last six months to a year defending himself and has not been practicing law.

Question: You take no steps to require him to give you a list of clients or anything like that?

Answer: No, sir.

The president of a state bar also acknowledged that there were no procedures in his jurisdiction regarding this problem:

We have no procedure for notifying clients of disbarred or suspended attorneys that such action has been taken, although a copy of the order of suspension or disbarment is filed in the office of the circuit court clerk in the county in which the suspended or disbarred attorney practices. This probably is wholly insufficient and it does not go far enough.

Only a few jurisdictions have addressed themselves to this problem. In New York City, for example, instructions are issued to all attorneys who are suspended or disbarred requiring them promptly to notify their clients of their inability to continue to act as their attorneys and the necessity that new counsel be retained promptly. The State Bar of Michigan occasionally assumes responsibility for the appointment of a committee of

lawyers selected by the local bar association to inventory the files of attorneys who have disappeared and to take appropriate action, under court supervision, to turn the files over to the clients.

RECOMMENDATION

A court rule requiring (1) that attorneys who are disbarred or suspended must notify all clients within a specified time of their inability to continue to represent them and the necessity for promptly retaining new counsel; and (2) that whenever an attorney is suspended for disability, or disappears or dies while under investigation, the disciplinary agency shall determine whether a partner, executor or other appropriate representative of the attorney concerned is available to notify and protect the interests of the attorney's clients and, if not, shall petition the court having disciplinary jurisdiction to take necessary action for the protection of the clients involved.

DISCUSSION

Clients of attorneys suspended or disbarred can be protected by requiring the attorney to notify every client that he can no longer represent him and that he must retain new counsel. Since the disciplinary agency that conducted the proceeding has no independent knowledge of the identity of the clients and is not equipped to determine that every client has been notified, the attorney should be required to furnish an affidavit to the disciplinary agency within a specified time after the entry of the order imposing discipline that he has complied with the notification provisions. The disciplinary agency then would be alerted, if no such affidavit were filed within the time specified, to the need to contact the attorney in order to make certain that his clients are protected against the abandonment of their rights. By incorporating this notice requirement in the order imposing discipline, a failure by the attorney to comply could be punished by the exercise of the court's contempt power. Moreover, any failure to comply could also be called to the court's attention in opposition to any subsequent application by the attorney for reinstatement.

Protecting the clients of an attorney whose practice is terminated suddenly by suspension for disability, or by disappearance or death while under investigation, is more difficult, as the attorney is either not responsible or unavailable. Someone must take responsibility in these instances for examining the attorney's

files and notifying clients as well as adversary counsel. If the attorney concerned or his estate is represented adequately by a partner, executor or other responsible party capable of concluding the attorney's affairs with proper regard for the protection of the clients, the disciplinary agency need not concern itself beyond determining that an appropriate representative exists. But when no representative can be located, action must be taken to protect the attorney's clients.

Assumption of that responsibility by the bar is fully consistent with its undertaking to protect the public in its dealings with the profession. Since the files of the disabled or unavailable attorney as well as his clients are most readily accessible in the locale where the attorney maintains his office, the local bar association is best suited to carry out this responsibility. Consequently, whenever a disciplinary agency files a petition in the court having disciplinary jurisdiction demonstrating that no adequate representative exists capable of concluding the affairs of an attorney who has been suspended for disability, or who has disappeared or died while under investigation, the court might appoint one or more attorneys designated by the local bar association to serve as a committee to inventory the attorney's files and to notify the court of its findings and the action it proposes to protect the clients. In making the appointment, the court might well consider using the services of a retired judge or attorney, as this would minimize the possibility of conflict of interest. The court should then review the report of the committee and enter an order authorizing it to take the proposed action with such modifications as the court may direct. This procedure must be carried out expeditiously lest substantial rights of the clients are extinguished by delay.

In order to protect the clients, the court rule authorizing this procedure should extend the attorney-client privilege to the members of the committee appointed to inventory the attorney's files, so that they cannot be required, without the clients' consent, to disclose any information gained from their examination of the files. Moreover, whenever such a committee of attorneys is appointed to inventory the files of an attorney, it may be necessary for the committee to take physical possession of the files and to turn them over to the clients, subject to court approval. In that event, a record should be maintained of all facts in the file pertaining to the absent attorney's right to fees earned in order to protect his interests.

Problem 28

Disbarred attorneys too readily reinstated by the courts.

DIMENSION

Court policy toward reinstatement of disbarred attorneys varies widely from jurisdiction to jurisdiction. In a few states reinstatement is not permitted. The Supreme Court of Ohio, for instance, provides by court rule that "a person disbarred shall never thereafter be readmitted to practice law in this State" (Rule XXVII (7)). In New York an attorney convicted of a felony is disbarred automatically and may not seek reinstatement or modification of the disbarment unless the conviction is reversed or he receives a pardon. While there is no specific prohibition in New Jersey against reinstatement of disbarred attorneys, the New Jersey Supreme Court as a matter of policy generally refuses to do so.

On the other hand, some states report that their courts not only reinstate disbarred attorneys but do so as a matter of course. In a few states, such as Louisiana and Illinois, a disbarred attorney need not await the passage of any specific period of time before applying for reinstatement. This means that it is theoretically possible for him to be restored to practice before a suspended attorney who must await the expiration of the period of suspension before applying for reinstatement. South Dakota does not even require that notice of a petition for reinstatement be given to the agency that conducted the disbarment proceeding or to any other representative of the organized bar. A few other jurisdictions are less permissive but limit the investigation the disciplinary agency may conduct in connection with an application for reinstatement to matters arising after the date of the disbarment.

Consequently, as a member of a disciplinary agency from such a state pointed out, evidence of serious acts of misconduct that occurred before the disbarment and of which the disciplinary agency was not then aware may not be raised in opposing the application for reinstatement:

In 90% of our cases disbarred attorneys are readmitted on application and, unfortunately, this committee is restricted in its investigation to what the attorney has done since disbarment. Even though we may have discovered something prior to disbarment which was not included in the disbarment proceedings, we are not allowed to go into that. There may be other matters which warrant the court's refusing to reinstate the disbarred attorney, but we are not permitted to go into them.

RECOMMENDATION

A court rule providing (1) that either a person disbarred shall not be readmitted to practice or that a specified period of time, exceeding the maximum suspension that court imposes, must elapse before a disbarred attorney may apply for reinstatement, and (2) that reinstatement shall be granted only on the affirmative showing by the applicant that he possesses the requisite qualities of character and learning.

DISCUSSION

Suspension of an attorney found guilty of misconduct is authorized in every disciplinary jurisdiction in the United States. Disbarment implies that a suspension of the attorney is inadequate and that his permanent removal from practice is required.

Some courts adhere strictly to this concept and absolutely refuse to reinstate the disbarred attorney. They seriously doubt that reliable evidence can be adduced to establish that an attorney who has engaged in substantial misconduct will not do so again if restored to a position of trust; they believe that the public should not be required to bear that risk. This attitude was reflected in the testimony of a member of a court disciplinary agency:

One of the things which bothers me personally is that disbarment in our state is not in reality a permanent matter. I feel that disbarment should not be given as punishment, except under extreme circumstances; but by like token, having once been given, I find it very difficult to believe that the attorney can establish that he has rehabilitated himself so that when he is readmitted he is entitled to command the respect and attention of the court and to make representations to the court which the court must accept.

Some states, such as Missouri and California, while not categorically rejecting the possibility that a disbarred attorney may merit reinstatement, require him to make a strong affirmative showing in support of his application to be restored to practice. In Missouri this policy has resulted in the reinstatement of approximately ten of the 125 attorneys disbarred in recent decades. The disbarred attorney is required to produce evidence indicating that he is unlikely to succumb again to the temptation and pressure to repeat the misconduct for which he was disciplined. The standard of proof usually applied by these states requires the disbarred attorney to adduce evidence of good character similar to that required of him if he were an original applicant for admission to the bar. The chairman of a state disciplinary commission described the reinstatement requirements in his jurisdiction:

REPORT ON DISCIPLINARY ENFORCEMENT

Our reinstatement provisions require specifically that we find, as a board, that a disbarred attorney has the original qualifications to be admitted as a member of the bar, that we relate it back to the time of his original admission so far as his educational requirements are concerned. He must also have the moral qualifications to be readmitted. But then, it goes on much further than that. It says that he must show that he is now a fit person to be admitted to the practice of law notwithstanding his previous disciplinary action. And he must show evidence of rehabilitation.

In other words, it is not sufficient for him to say, "I was a rascal 20 years ago, but I am no longer a rascal and I want to be readmitted." He must come in with affirmative evidence and show evidence of rehabilitation.

Proper application of this standard means that it should be as difficult for the disbarred attorney to be reinstated as it is for a law school graduate who has been convicted of a crime to be licensed.

Courts in some jurisdictions are more concerned with the personal predicament of the disbarred attorney than they are with protecting the public, and they lower their standards in passing on applications for reinstatement. This was acknowledged in a colloquy between a member of this Committee and a member of a state disciplinary commission:

Question: When the court considers a reinstatement, is it your feeling that the court is applying the same standards to the applicant for reinstatement that it would apply to the new applicant for admission to the bar?

Answer: I don't think they are, because if a man stood convicted of a felony and that was the basis of disbarment, I don't think they would consider the application of a convicted felon for admission to the bar. But on readmission, the court gives consideration to the attorney's economic condition, his family relationship, whether he can earn a living in some other area, and the court is reluctant to deprive the man of his livelihood. The court is more concerned with these matters than it is with the protection of the public against this type of lawyer.

In addition to character evidence tending to negate the likelihood of future misconduct, the disbarred attorney may be required on his petition for readmission to demonstrate that he possesses adequate legal expertise to represent clients again. This showing is necessary since a number of years usually have elapsed since the attorney has practiced, and during that time significant changes in the law may have occurred. Evidence that the disbarred attorney has kept himself abreast of changes by reading the

advance sheets and the local law journal generally is accepted as adequate. A few jurisdictions, however, require the disbarred attorney to pass the bar examination again before his motion for reinstatement can be considered. Massachusetts has this requirement. In Hawaii any attorney suspended for more than six months is required to pass the bar examination as a condition precedent to applying for reinstatement.

Neither a policy of permanent disbarment nor of permitting reinstatement under strictly applied standards presents any significant problem in disciplinary enforcement. There is no need for this Committee to express a preference for either or to comment on the different philosophies on which these policies are predicated. Indeed, the differences are reflected among the members of this Committee. We all agree, however, that the policy of some states to reinstate disbarred attorneys automatically, provided that a certain minimal period of time has elapsed since the disbarment and the attorney has in the meantime avoided engaging in any known impropriety, seriously impairs disciplinary enforcement. We are supported in that view by many of the persons engaged in disciplinary enforcement across the country who testified before us. A state bar counsel, for example, testified:

There is only one other thing I want to say and that is about this business of reinstatement. This must, of necessity, be taken with more seriousness by the court itself. We go to all the trouble of investigating these people, trying them and imposing some sort of punishment on them. If a lawyer feels that he is in jeopardy of losing his livelihood and will not be able to get back, then he is going to look with a great deal more care upon his daily conduct.

I think reinstatement ought to be more difficult than initial admission. If it isn't, then the force of discipline would lose all its meaning.

The president of a large local urban bar association also expressed reservations about his state's policy concerning reinstatement of disbarred attorneys:

We have no specific period of time that need elapse between a disbarment and an application for reinstatement. The general principle, on which very few decisions have been written, is that a man is entitled to reinstatement when he has been rehabilitated.

I, for one, don't any longer know what rehabilitation means in that context. Theologically, rehabilitation implied an acknowledgement of the commission of sin, a contrite heart, a true spirit of repentance. As nearly as I can figure by our procedures, rehabilitation means that for some period of time following disbarment the man has not been in trouble.

REPORT ON DISCIPLINARY ENFORCEMENT

A member of a state bar disciplinary agency agreed with these statements:

If there is a just and fair order entered against a man who has been found guilty, then it should be with great reluctance that they upset that or that they cut it down or reinstate the man if he has been disbarred, and it shouldn't be just on a flimsy little showing that he moves to a new community and sets himself up as an angel and conducts himself with a design to get back into the bar.

As these comments suggest, automatic reinstatement renders the original disbarment meaningless, and it may subject the profession to the criticism that it is not genuinely interested in policing its members but is prepared to reinstate any malefactor as soon as the "heat is off." Moreover, as the chairman of a state disciplinary commission explained, a lax reinstatement policy may expose the public to the risk of further misconduct:

I would say that the problem of reinstatement gets back to the "live and let live" attitude; it is another form of it. We have had two cases in my tenure as chairman of the disciplinary commission in which lawyers were disbarred in fairly aggravated circumstances, arising in both cases out of personal and emotional problems the lawyer had.

The lawyer at the end of several years had been going to his pals at the bar, responsible lawyers of this community, and had asked and gotten them to sign a document supporting his reinstatement. This is out of, you know, the kindness of their hearts. They are nice guys, so they signed this thing and the man has filed for reinstatement. The supreme court, confronted with an almost unanimous feeling of the bar of such-and-such a county, said this man should be readmitted.

And in both cases, within fourteen months in the case of one of them and within two years in the case of the other, they were off the reservation again and we have been trying to find them and get them off the roll of attorneys.

We recommend the adoption of the following standards for reinstatement of disbarred attorneys by those states that permit reinstatement:

1. A minimum period of time must elapse following disbarment before an application for reinstatement may be filed by a disbarred attorney. This period should exceed the maximum suspension (other than indefinite suspension by reason of disability) imposed in the jurisdiction, otherwise, the initial decision to disbar rather than to suspend is undermined. Kentucky, for example, provides that a disbarred attorney may not apply for reinstatement until at least five years have elapsed.

2. The mere passage of time without incident should itself be considered inadequate to warrant reinstatement. Evidence of

present good character and present legal knowledge that would entitle the attorney to admission to the bar if he were an original applicant should be required. The burden of making this showing should be on the applicant rather than on the disciplinary agency to demonstrate improper conduct by the attorney subsequent to his disbarment.

3. Since the court having disciplinary jurisdiction does not make any distinction between offenses that warrant disbarment at the time discipline is imposed, the nature of the offense and the circumstances surrounding it should be considered in evaluating an application for reinstatement. Thus, the more serious the offense, the nearer it strikes at the heart of the administration of justice, the greater the affirmative proof that should be required of the applicant for readmission. For example, it is difficult to conceive of circumstances that would justify the reinstatement of an attorney who has been disbarred for bribing a juror.

4. The allegations advanced by the attorney in support of his application for reinstatement should be investigated carefully. A hearing should be held by the disciplinary agency, board of law examiners, committee on character and fitness or other appropriate agency at which witnesses and the attorney testify and are subject to cross-examination. The cost of this hearing should be borne by the attorney, who should be required to pay a stated fee for that purpose upon the filing of his application for reinstatement.

5. Since a disbarred attorney is not entitled to reinstatement as a matter of right, a reinstatement application does not raise questions of law but of judgment with respect to which the opinions of the applicant's peers should be given great weight. The recommendation of the agency should be accepted by the court having disciplinary jurisdiction unless it finds the recommendation arbitrary or capricious.

Part C-Interagency Relations

Problem 29

No procedure for notifying disciplinary agencies when attorneys admitted to practice in their jurisdiction are disciplined elsewhere.

DIMENSION

The attorney disciplined in one jurisdiction but who continues to practice in another in which he also is admitted not only poses a substantial threat to innocent clients but also subjects the profession to criticism. Who can believe that the profession is seriously concerned about disciplinary enforcement when an attorney disbarred in one jurisdiction is free to practice in another? State bar counsel described the incongruous results which may occur now:

There is one thing that has come to my attention very recently. We have a reinstatement hearing set for a man next week who was disbarred and had been given permission to apply for reinstatement. He was disbarred in 1960, and he has been disbarred in the federal courts of this area, including the Tenth Circuit, but in his application for reinstatement he makes much of the fact that he is still a member of the bar of the Supreme Court of the United States and of the District of Columbia.

Now, I respectfully submit that we need something at the national level to get this business coordinated in some way. It is really absurd.

Shortly after embarking upon its assignment, this Committee became aware of similar instances in which attorneys admitted to practice in several jurisdictions were disbarred in one without any of the others ever having become aware of it. In these cases the attorney continued to practice in the other jurisdictions, although evidence existed that had been determined judicially to demonstrate his lack of fitness. The dimensions of the problem were illustrated in the following colloquy between a member of this Committee and the chairman of a court disciplinary commission:

Question: You mention the problem of a lawyer that is admitted on comity here. Suppose he is disbarred after being admitted here. He is disbarred in his home jurisdiction. Do you receive information as to disciplinary action taken against such attorneys in their home jurisdiction?

Answer: No, sir.

Question: So it would be possible for that person to be disbarred, and yet that not come to your attention at all and he could continue to practice here?

Answer: That is right. For example, the other bar might not even know where the man is. He has left, and he might be anywhere. I assume they would not know where he was attempting to practice.

Question: You would have gotten information originally with regard to his admission here on comity. You would have made an inquiry?

Answer: The Chicago office of the National Conference of Bar Examiners would have made an inquiry. Now, we also have had occasions where a man has given false information on his application to be admitted on comity, and in those cases the admission has been revoked.

Question: Yes, I understand that. But I am concerned with a case where the man was disbarred in what we might call the home jurisdiction. That information would not necessarily come to your attention?

Answer: It would not.

Question: So he might continue to practice here for years after he had been disbarred?

Answer: That is right.

Question: In the same line, you do not make it a practice where a man was admitted here by comity, is disbarred here, to notify his home jurisdiction?

Answer: No, we do not.

Question: It is a complete failure of communication either way.

Answer: I think that is right.

We have even had called to our attention a situation in which an attorney managed to have himself admitted in a new jurisdiction after having been disbarred in the state of his original admission. He was able to accomplish this by falsely representing to the admitting authorities in the new jurisdiction that he had never been licensed and, therefore, he requested and was granted permission to take the bar examination. The admitting authority, having no central national index of disciplined attorneys against which they could check the applicant, was unaware of his misrepresentation.

Witnesses who appeared before us from states in which disciplinary jurisdiction resides in a county court rather than a statewide court have told us of instances in which an attorney was disbarred in one county without anyone in the neighboring county knowing of it. The chairman of a state bar association disciplinary agency testified:

Because of the peculiar geographical set-up in all of these counties, it is entirely possible that a lawyer can be disbarred in one city within the state and we in another city in the same state will never find out about it because the case is not appealed and, therefore, is not formally reported.

Similarly, we have been told that there are state disciplinary

jurisdictions that fail to advise the federal courts sitting in the identical geographical location of discipline imposed on an attorney who is a member of both the state and federal bars. This was illustrated by an exchange between a member of this Committee and the chairman of a local disciplinary agency:

Question: Do you have any machinery for keeping in touch with what the federal courts do with respect to disbarments, and in turn do they have any way of finding out what you do about disbarments and discipline? For example, does your committee inform the federal court of any action you take against local lawyers?

Answer: Our practice is to do so informally. We have no official machinery for doing so other than that any suspension or disbarment will be published in the state bar journal, I believe.

It has not been unusual for the public to be subjected to the spectacle of an attorney forever barred from practicing in a state courthouse remaining fully eligible to walk across the street into the federal courthouse and there command the respect reserved for one entitled to the status of attorney.

These situations exist because there has been no systematic procedure by which disciplinary agencies are advised whenever attorneys are disciplined. It is, of course, impossible to determine how extensive this problem has become, but the circumstances which give rise to it are likely to increase as more and more attorneys are admitted in more than one jurisdiction as the result of the demands of modern practice.

RECOMMENDATION

Establishment of a National Discipline Data Bank to which every court and administrative agency should report all formal discipline imposed against attorneys for dissemination to every disciplinary agency within the United States.

DISCUSSION

The evidence submitted to this Committee that attorneys admitted to practice in several jurisdictions may continue to practice despite disbarment in one appeared to be a matter of highest priority. Our concern was increased by the Federal Agency Practice Act of 1965, which provides that an attorney in good standing in the highest court of his state may practice before federal agencies. We were advised that these agencies no longer police the ranks of the practitioners who appear before them but rely more and more on state disciplinary agencies. For example, a high official of the Internal Revenue Service told us:

The Agency Practice Act says that attorneys and C.P.A.'s in good standing may practice before the Service without enrollment. The department concluded, therefore, that the Service should not concern itself with violations of professional ethics other than (1) those which affect the rights of taxpayers to sound representation before the Service, and (2) those which affect the ability of the Service to carry out its functions and mission.

Accordingly, in 1966, Circular 230 was revised to eliminate all of the standards that are more properly enforced or applied at the state regulatory agency level. For example, before 1966, the conviction of a practitioner for any crime involving moral turpitude would have been grounds for instituting a disciplinary proceeding. Now, the grounds for such action would be limited to conviction for a criminal offense under the revenue laws of the United States, or for an offense involving dishonesty or breach of trust.

Such increased reliance on local and state disciplinary agencies seemed totally useless so long as disciplinary cases were not communicated to the federal agencies because no structured vehicle for exchange of information existed. The gravity of the problem indicated to us that corrective steps could not await the completion and submission of our final report.

Accordingly, we submitted an interim report to the American Bar Association House of Delegates summarizing the problem and recommending the prompt establishment of a National Discipline Data Bank. We recommended that the data bank act as a depository to receive and store certain information concerning attorneys subjected to formal public discipline or who resigned while a complaint of misconduct was pending, such information to include the attorney's name, current office and home addresses, and other pertinent information specifically identifying the attorney, the nature of the charges sustained, the discipline imposed, the court in which such action was taken and any other jurisdiction in which he is known to be admitted.

We further recommended that a list showing the information received in the preceding period be prepared and distributed to every disciplinary agency (including courts having disciplinary jurisdiction) within the United States at least once every three months, enabling each agency to determine if any of the attorneys named is admitted in its jurisdiction. If so, the agency could request a certificate of the discipline and other relevant details of the proceeding from the court in which the attorney had been disciplined, and it then could institute appropriate proceedings in its jurisdiction.

In addition, we recommended that the data bank maintain a

REPORT ON DISCIPLINARY ENFORCEMENT

record of all attorneys against whom discipline had been imposed for reference in the event of future inquiry concerning the attorney.

The highest court of every state and some of the larger disciplinary agencies were contacted to determine whether they would cooperate by establishing procedures for furnishing the necessary information to the data bank. A favorable response having been received, the House of Delegates authorized the establishment of the bank, and it now is functioning.

The attorney who has been convicted of a serious crime warranting professional discipline may escape the attention of the local disciplinary agency in much the same manner as in the case of the attorney disciplined elsewhere. We hope that once the data bank has been well established, its functions will be expanded to enable it to gather and disseminate information concerning attorneys convicted anywhere in the United States of crimes that reflect upon their fitness to practice law.

Problem 30

No consultation and exchange of information among disciplinary agencies about their mutual problems in disciplinary enforcement.

DIMENSION

In every disciplinary jurisdiction there are some lawyers responsible for disciplinary enforcement who seek continually to improve the structure through which they function. Some are judges sitting on courts having disciplinary jurisdiction. Others are private practitioners who have accepted the responsibility of serving on disciplinary agencies. Still others are attorneys—some staff, many volunteers—who represent the bar in investigating complaints and presenting evidence. Although these members of the profession are seeking to solve the same problems, no structure has been developed to provide for mutual consultation and exchange of information.

This explains, in part, the widely different disciplinary structures and practices even within the same state. A state court administrator commented:

I think our own rules and procedures are rather adequate when you read them, but there is a good deal of difference between the system as it is prescribed and the system as it works. This, I think, is attributable to wide variation in personal attitude and policies, not only in different committees but in individual members of the committee.

I think this is an area where we need manuals, conferences and meetings in order to develop a more cohesive concept as to what policies in the jurisdiction are necessary and desirable.

Lack of consultation between disciplinary agencies also has resulted in situations in which cases involving fundamental questions in disciplinary enforcement have been litigated through the courts in one state without the disciplinary agencies of other states being aware of it before the final decision by the Supreme Court of the United States is announced. Even in an area such as Washington, D.C., where attorneys admitted to practice in several adjoining states practice in the same locale and the several state disciplinary agencies are faced with mutual problems, no structure for consultation between them has been developed.

The only structured exchange of information in the entire field of disciplinary enforcement occurs among professional staffs through the National Organization of Bar Counsel. Members of

REPORT ON DISCIPLINARY ENFORCEMENT

this organization meet semiannually at the annual and midyear meetings of the American Bar Association to discuss mutual problems in disciplinary enforcement and the unlawful practice of the law. They draw on the expertise and experience of others similarly engaged. The benefits of these exchanges have been so substantial that there has been an increasing intercommunication among the members of the National Organization of Bar Counsel between meetings.

RECOMMENDATION

Creation of a National Conference on Disciplinary Enforcement, with a permanent staff, to arrange periodic regional and national meetings of those engaged in disciplinary enforcement; to prepare training courses for judges, disciplinary agency members and staff; to maintain a national memorandum of law file; to provide leadership in periodic review and revision of practices and procedures in disciplinary enforcement; to serve as a central clearing house for information concerning lawyer misconduct; to maintain the National Discipline Data Bank; and to implement the recommendations of this Committee.

DISCUSSION

The national survey of enforcement practices conducted by this Committee discloses that there is rarely any exchange of information or consultation regarding mutual problems among disciplinary agencies or courts having disciplinary jurisdiction. This lack of communication often exists not only among the states but among local disciplinary agencies as well. It is not unusual to find that disciplinary structures within a state vary almost as much as those of different states. It also is not unusual to find that one state's disciplinary agency is struggling with a substantive or procedural problem while completely unaware that the same problem already has been faced and resolved by the disciplinary agency in another state. Even when one disciplinary agency seeks to obtain the benefit of the experience of other agencies as to a particular problem, there is no single source of information to which the inquiring agency can turn to determine which particular jurisdiction might be helpful.

This waste and inefficiency can be overcome by the formation of a permanent National Conference on Disciplinary Enforcement. This organization, provided with adequate staff, could develop and

administer a number of programs to coordinate disciplinary enforcement throughout the United States. These include:

1. Regional conferences on disciplinary enforcement to be attended by judges of courts having disciplinary jurisdiction, members of disciplinary agencies and attorneys who serve as counsel to disciplinary agencies. The chairman of a local bar association disciplinary agency echoed the need for such meetings at which volunteer members of his agency could be instructed in the day-to-day practice of the agency:

I think that every year the grievance committees in the different bar associations should meet on either a department or state level, and perhaps this Committee can present some method on how the grievance committees should be instructed in sample procedures and sample cases and so on, provide them with dimensions and procedures which they should follow.

This format was used in the regional meetings conducted across the country by this Committee. The benefits derived from the exchange of views and the new ideas communicated by representatives of one jurisdiction to another were the subject of enough unsolicited expressions of approval to indicate that the same format could be most useful on a regular, structured basis. The president-elect of a local bar association stated:

We have been very glad to be here. I suppose that it is only frank to state that we came with some fear that we might be bored, but we came away yesterday very stimulated and very excited about the prospect of the report which this Committee may bring out, and which we think would be tremendously helpful to us in the task which we have set for ourselves in the complete revision of the rule governing disciplinary procedures.

The chairman of a state bar disciplinary agency also commented upon the benefit he derived from the opportunity of exchanging views with representatives of disciplinary agencies from other states:

One of the best things that happened to bar discipline in our state, as far as I am concerned, in recent times is this meeting here and the wonderful and useful ideas we have picked up from it.

The format of regional meetings should include a general assembly for dialogue among all in attendance as well as workshop sessions for those in similar phases of enforcement. Separate conferences could be planned for judges, disciplinary agency members and counsel at which the problems encountered by each group could be considered and the expertise of those similarly engaged obtained. One state bar counsel commented:

REPORT ON DISCIPLINARY ENFORCEMENT

I have been involved in disciplinary work for more than ten years. This is the first time I have ever known that people concerned with disciplinary problems have ever gotten together. It seems to me that periodic meetings of this sort to trade problems, trade procedural breakdowns, trade all kinds of secrets, so to speak, is one thing that will be very useful. I have never known this to occur before.

This is the format now used by the National Organization of Bar Counsel, a voluntary association of members of professional disciplinary agency staffs, which has proved most useful in providing a forum for meaningful discussion of mutual problems and in acquainting the members with each other, thereby facilitating mutual consultation concerning specific problems.

The size and dimension of the regions for such meetings, the desirability of separating jurisdictions with an integrated bar from those with a nonintegrated structure and other details which must be considered in arranging meetings are outside the scope of this report and should be left to the proposed National Conference on Disciplinary Enforcement and its staff.

2. Development of training courses and materials for those engaged in disciplinary enforcement. The staff of a National Conference on Disciplinary Enforcement could develop a curriculum and assemble a teaching staff drawn from the best available personnel across the country to provide courses of instruction in disciplinary enforcement for new judges of courts having disciplinary jurisdiction, new disciplinary agency members and new attorneys appointed to staffs of disciplinary agencies. In addition, appropriate training manuals could be prepared.

3. Maintenance of a legal index concerning disciplinary enforcement. The staff of the National Conference on Disciplinary Enforcement could maintain a file of disciplinary decisions rendered within the United States, indexed by subject matter. The conference also could serve as a depository for memoranda of law prepared by attorneys representing disciplinary agencies concerning substantial legal problems in enforcement. These materials would be available upon inquiry by any member disciplinary agency. A periodic bulletin concerning disciplinary enforcement disseminated to all participants might be possible.

4. The National Conference on Disciplinary Enforcement, which constantly would receive nationwide information concerning problems and court decisions, could provide leadership for a continuing review of practices and procedures and recommend changes that appeared to be necessary and desirable. As substantial

problems are noted by the staff of the conference, a survey could be conducted among other disciplinary agencies to determine what measures, if any, might have been developed to cope with the problems; proposed reforms could be drafted and submitted for discussion at regional meetings conducted by the conference; changes agreed on could be formulated into proposed court rules for adoption and the new procedure incorporated into training courses and procedural manuals.

5. The National Conference on Disciplinary Enforcement also could serve the function of a national clearing house for information concerning lawyer misconduct. Individuals, law enforcement agencies and others seeking to complain about the conduct of an attorney or having evidence of misconduct, but unaware of the disciplinary agency having jurisdiction over the attorney concerned, could submit the information to the conference for dissemination to the appropriate agency. At present, no central depository of this nature exists.

6. The National Conference on Disciplinary Enforcement also would be the proper vehicle to administer the National Discipline Data Bank, thereby further centralizing the source of all information concerning attorney misconduct.

7. The National Conference on Disciplinary Enforcement also could act for the implementation of this report and the recommendations of this Committee. In 1956 the House of Delegates of the American Bar Association approved a draft of model rules of court for disciplinary proceedings prepared by the Special Committee on Disciplinary Procedures (81 *Reports of American Bar Association* 391, 395, 475). The resolution approving the code directed that the draft be printed and disseminated "to judges of the Courts of last resort in the several states, to state and local bar associations, to chairmen of grievance committees, and to other interested persons and organizations." No further action to seek adoption of the model code in the states seems to have been taken. There were no further communications with the various disciplinary authorities to promote specific consideration of the model code. No assistance was offered in interpreting the model code and in analyzing the disciplinary structure in each jurisdiction to determine its effectiveness and how adoption of the model code might result in improvement. As a result, most jurisdictions do not appear to have given the model code serious consideration,

and it was largely forgotten as the terms of office of those engaged in the disciplinary process at the time it was circulated expired.

Today, some twelve years later, we are still faced with a lack of uniformity so extensive that there are nearly as many disciplinary structures in this country as there are disciplinary jurisdictions.

The recommendations of this Committee, which is sponsored and funded by the American Bar Association, should not be permitted to evaporate. Disciplinary agencies throughout the United States have demonstrated their interest in improving enforcement and their acceptance of American Bar Association's leadership by their cooperation and participation in the regional hearings of this Committee. The channels of communications that have been established should be preserved and expanded for the purpose of assisting each disciplinary jurisdiction to adopt procedures which the experience of others has proved most effective and which have been recommended by this Committee. A permanent National Conference on Disciplinary Enforcement is the ideal vehicle to promote these changes.

Part D—Ancillary Problems

Problem 31

Reluctance on the part of lawyers and judges to report instances of professional misconduct.

DIMENSION

Although lawyers and judges have the necessary background to evaluate the conduct of attorneys and are far better equipped than laymen to recognize violations of professional standards, relatively few complaints are submitted to disciplinary agencies by members of the profession. This fact has been cited as a major problem by nearly every disciplinary agency in the United States surveyed by this Committee. The past president of a state bar testified:

Lawyers are extremely reluctant to complain about their brethren. We have a false sense of fraternity that keeps us from complaining about other men when they do something wrong. Many lawyers have the attitude that you should not do anything to that man because what can he do if you disbar him or suspend his license. This tempering attitude can go so far as to result in dismissal or failure to find an attorney guilty.

The chairman of a local disciplinary agency reached the same conclusion:

The number of complaints we receive runs approximately 200 a year out of a group of some 2,500 to 3,000 active lawyers in the community. Of those 200 complaints, and I am speaking now of those in which the complainant thought enough of the matter to come in and sign an affidavit or make a written complaint, I would guess that slightly more than 1% come from lawyers.

Based on my contacts with my fellow attorneys in the community, I am sure that the reluctance of lawyers to come forward stems from a feeling that we are members of a brotherhood and so owe a sense of loyalty to one another so that we should not throw a stone.

RECOMMENDATION

Greater emphasis in law school and continuing legal education courses on the individual attorney's responsibility to assist the profession's efforts to police itself by reporting instances of professional misconduct to the appropriate disciplinary agency; sanctions, in appropriate circumstances, against attorneys and judges who fail to report attorney misconduct of which they are aware.

DISCUSSION

In an address at the 1965 annual meeting of the American Bar Association, then President Lewis F. Powell stated:

Surely no one wants punitive action, but it must be remembered that the bar has the privilege of disciplining itself to a greater extent than any other profession or calling. This imposes upon the bar a higher responsibility, one which the bar must discharge with greater determination.

If individual attorneys and judges shirk that responsibility, permitting wrongdoers in their midst to escape disciplinary action unless the circumstances are reported by laymen, the public may conclude that "self-policing" is in reality "self-protection." The failure of attorneys and judges to report instances of misconduct, while undoubtedly the result of the almost universal reluctance to inform, hampers effective enforcement and does a disservice to the bench, the bar and the public.

The client who retains an unethical practitioner may form his opinion of the entire profession from a single experience. If other attorneys who have become aware of the misconduct take prompt action against the violator, the client's respect for the integrity of the bar may be restored. If, on the other hand, the other attorneys close their eyes and do nothing, the client may conclude that the bar is engaged in a conspiracy to protect its own. Moreover, the attorney who takes no action when he becomes aware of apparent misconduct on the part of another often subjects future clients of the unethical practitioner to serious harm. For example, disciplinary agencies occasionally receive complaints of conversion by an attorney and discover, on investigation, that the monies were converted in order to make restitution of monies previously converted from another client. Not infrequently, the second conversion will have occurred after a demand by a new attorney consulted by the first client that restitution be made so that a complaint to the appropriate disciplinary agency will be unnecessary. By not reporting the conversion of the first client's funds immediately, and agreeing not to do so if restitution is made, the new attorney not only permits the unethical practitioner to continue to practice but may encourage subsequent conversion of another client's funds.

The chairman of the inquiry division of a state bar association disciplinary agency outlined some of the situations he had experienced:

A client who finds that he has been cheated by an attorney may go to another attorney. We find very often that the latter, instead of reporting the situation to the bar association and encouraging the client to do so, will end up representing that client and using the threat of a grievance complaint to exact restitution from the offending lawyer, and then drop it once restitution has been made. Or maybe there is no restitution at all, and this lawyer, out of some spirit of sympathy for his brother at the bar, will simply talk this client out of raising a fuss. And this happens in many instances.

In my own town, I learned quite by accident in a restaurant about a week ago that about six weeks ago a lawyer was removed as executor of an estate because it had been found by the probate court that he had come up short and that he had misused funds, that he even compromised claims by the estate against other clients of his, at prices that were unfair to the estate. Various other allegations of wrongdoing were found to be warranted and on the basis of those findings he was removed. No report of this was made to the local grievance committee. No report was made to the state bar association, and none whatever had been made, although there were no less than six lawyers involved in that case who represented various heirs, at whose insistence this other lawyer was removed as executor. Nobody reported it. Why?

The other example, another member of the disciplinary agency out in his area ran across a case just a couple of weeks ago where a lawyer had embezzled funds from no less than five different clients over a period of time, and one lawyer knew all about it but didn't say a word and sat on the information for a matter of years.

Judges generally do not report instances of wrongdoing to us. I think I can count on one hand the number of complaints that we have received from judges throughout the state about lawyers in the eight years I have been connected with the grievance committee.

Judges are not administering discipline on their own either. Don't get the impression that they are handling it in their own way. There are virtually no contempt of court proceedings against lawyers in this state. There may be a half a dozen here, but they would involve such things as impertinence to the court. They ordinarily do not involve things that we consider breach of duty to a client.

The adverse effect on the reputation of the bar and the danger to the public stemming from this reluctance of attorneys and judges require that strong measures be taken. The individual attorney's responsibility to report instances of misconduct as a necessary element of the self-policing privilege should be stressed in law school so that it is impressed on the lawyer during his formative years. Bar associations should engage in extensive educational campaigns as part of their continuing legal education programs to call the attention of the profession to the harmful effects of its silence in the face of misconduct.

A former chairman of a court disciplinary commission expressed the opinion that prompt reporting by attorneys of

instances of misconduct of which they become aware may even prove beneficial to the wrongdoers:

It seems to me somewhere in our profession we have to try to get the rank and file of the bar to realize that when they sense there is something wrong with one of their fellow attorneys, they are really not doing him any favor, nor are they doing the public any favor, by sitting back and allowing this to go unnoticed in one way or another.

I have a hunch that some of these cases that then blow up into major cases could have been nipped in the bud if we just could get a little more sense of responsibility in trying to call these things to the attention of the proper disciplinary bodies at an early stage, so that private censure or warning, or whatever you might call it, might well have some effect.

Consideration should also be given to sanctions against attorneys and judges who fail to report misconduct to the proper disciplinary agency in appropriate cases. Such sanctions are fully justified in light of the obligation imposed by Disciplinary Rule 1-103(A) of the Code of Professional Responsibility ("A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation"); Canon 29 of the Canons of Professional Ethics ("The lawyer should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession"); and Canon 11 of the Canons of Judicial Ethics ("A judge should utilize his opportunities to criticize and correct unprofessional conduct of attorneys and counsellors, brought to his attention; and, if adverse comment is not a sufficient corrective, should send the matter at once to the proper investigating and disciplinary authorities").

The existence and proposed use of sanctions, together with a restatement of the obligations of lawyers and judges, should be emphasized in bar publications. The chairman of a state disciplinary commission concluded that this action is absolutely necessary if the profession is to be jarred out of its complacency into the sense of concern and responsibility necessary for effective professional self-discipline:

I frankly feel, based on experience both at the grievance level and with respect to the disciplinary commission, that we are going to be wasting our time unless lawyers as a group—not just those of us who are concerned with grievance matters—unless lawyers as a profession become more concerned with and more sensitive to our responsibilities as individuals and to the collective responsibility of the profession.

I think that we have developed a "live and let live" philosophy. We really do not care much about what our colleagues are doing

unless they cross us. There is a good deal of talk among us about how we covet professionalism, but there is really not much indication to me that we have any overwhelming concern for the public interest in relation, at least, to the activities of our fellow lawyers.

Problem 32

No requirement that attorneys keep accurate records of client funds in their possession and have the records audited.

DIMENSION

In England and Canada solicitors are required to maintain complete books of account. Once a year each solicitor must submit his books to audit and file the auditor's certificate with the local bar organization. In addition, each bar organization retains one or more auditors to conduct unannounced spot audits of attorneys' financial records throughout the year. A queen's counsel in Toronto described one of these:

For example, in the spring of 1964, a blitz of more than 400 spot audits was made covering whole areas of certain communities. The result was a tightening up of records and bookkeeping procedures which could be measured statistically. The number of instances in which faults appeared were sharply reduced as a result of the spot audit campaign.

No similar procedure for supervising the manner in which attorneys handle client funds exists in the United States. The few recordkeeping provisions that exist generally require that an attorney maintain his entire file in specified matters for a given number of years. In Maryland, for example, attorneys are required to maintain their files in all negligence actions for a period of five years following the final completion of the case. Disciplinary Rule 9-102(B)(3) of the newly adopted Code of Professional Responsibility requires an attorney to "maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them." However, the rule does not specify the period of time over which such records must be maintained and apparently contemplates that they need be available only during the period that the client's funds or other properties are held by the attorney. The rule itself does not assure that these records will be available for a reasonable period after the attorney has released all client funds or other properties in his possession in the event a complaint subsequently is submitted to a disciplinary agency.

The problem resulting from the absence of any recordkeeping requirement concerning client funds has been aggravated by the decision in *Spevack v. Klein*, 385 U.S. 511 (1967). Prior to that decision, an attorney accused of mishandling client funds could not refuse to answer an inquiry by disciplinary authorities on the

ground of his constitutional privilege against self-incrimination, since the refusal might itself warrant disbarment (*Cohen v. Hurley* 366 U.S. 117 (1961)). *Spevack* reversed *Cohen* and held that the imposition of discipline on an attorney for his failure to respond to inquiries into his professional conduct on the ground that to do so would tend to incriminate him violates the attorney's constitutional privilege. Now an attorney accused of mishandling client funds may refuse to answer inquiries concerning the matter on the ground of constitutional privilege. In the absence of records through which the funds can be traced, it is difficult, if not impossible, to determine their actual disposition.

In *Spevack* the Supreme Court specifically declined to pass on the question whether the constitutional privilege was available to an attorney to justify refusal to produce records which he was required to maintain pursuant to appropriate court rule or other regulation under the doctrine of *Shapiro v. United States*, 335 U.S. 1 (1948). The Court had held in *Shapiro* that records required to be kept pursuant to O.P.A. regulations were public in nature and could not be withheld on demand by an authorized agency on the ground that to do so would tend to incriminate the individual required to keep the records.

RECOMMENDATION

A court rule requiring (1) that all attorneys maintain the records pertaining to client funds required under the provisions of Disciplinary Rule 9-102(B)(3) for a reasonable period after final distribution of the funds has been made; and (2) that these records be audited annually.

DISCUSSION

A requirement that attorneys maintain complete financial records concerning client funds in their possession and have the records audited annually should act as a powerful deterrent to mishandling of the funds. A recordkeeping requirement alone does not provide a sufficient deterrent (see *Blackmon v. Hale*, 78 Cal. Rptr. 569, 580-583 (1969)). The executive director of a state bar urged that some provision be made for inspection by audits in order that the requirement be fully effective:

There is a need for requiring attorneys to maintain financial records of trust accounts. If there could be a uniform recordkeeping requirement promulgated, followed by some kind of method of

REPORT ON DISCIPLINARY ENFORCEMENT

supervising the attorney, I think it would go pretty far to clear up violations of fiduciary relationships.

This could be accomplished by requiring each attorney to submit the report of audit for each intervening year whenever that attorney files the periodic registration statement elsewhere recommended.

Requiring attorneys to maintain such detailed financial records concerning client funds in their possession also should assist disciplinary agencies in investigating complaints alleging mishandling of funds. The attorney complained of would have to produce on inquiry a detailed record of his handling of the client funds or face discipline solely for having failed to do so. Moreover, since these records apparently fall within the required-records doctrine promulgated in *Shapiro*, their production could not be refused on the ground that to do so would tend to incriminate the attorney concerned.

The New Jersey State Court Administrator testified that the supreme court of his state has promulgated a rule requiring the maintenance of such records and their production on demand by an authorized disciplinary agency:

The rule, in addition to calling for the attorney to keep detailed and specific records in connection with his law practice, concludes by providing that these records are subject to subpoena by the ethics committee or for production before any person designated by the Supreme Court. It also contains a specific provision that if an attorney does not maintain and keep these records, or fails to produce them when called upon to do so, that in and of itself shall constitute grounds for discipline.

Problem 33

No training courses on ethical standards and disciplinary enforcement for judges responsible for lawyer discipline.

DIMENSION

Judges elected or appointed to civil or criminal courts usually have had substantial experience in these fields in private practice. The knowledge they bring to the bench is supplemented by instructional courses conducted by the local court administration and national judicial training centers. These courses are not limited to instruction in substantive law but encompass practice and procedure as well.

Judges elected or appointed to courts having disciplinary jurisdiction, on the other hand, rarely have had prior experience in the disciplinary process. The number of attorneys serving as members of disciplinary agencies or as paid or volunteer prosecutors is too limited to involve a substantial segment of the bar. Regardless of his experience, however, a judge elected or appointed to a court with disciplinary functions immediately assumes responsibility for the effectiveness of discipline within his jurisdiction. But the instructional courses for judges rarely include the subject of professional discipline.

RECOMMENDATION

Expansion of judicial training courses, such as those conducted by the Federal Judicial Center, to include instruction in substantive and procedural problems in disciplinary enforcement.

DISCUSSION

The unavailability of judicial training courses on ethical standards and disciplinary enforcement is reflected in the absence of any consistent judicial approach toward disciplinary proceedings or the imposition of effective discipline on the attorney. It is often virtually impossible to predict the extent of discipline that may be imposed by a court through an analysis of prior cases concerning similar misconduct, because the cases often have resulted in widely dissimilar sanctions. (See note, "The Imposition of Disciplinary Measures for the Misconduct of Attorneys," 52 *Columbia Law Review* 1039 (1952).) Many disciplinary agency members have expressed their concern over instances in which courts have

imposed inadequate discipline. The president of a state bar, for example, testified:

We have been distressed from time to time that the court has failed to support the recommendations of the administrative committee of the board of governors, that the discipline which is subsequently meted out is far short of the recommendation made.

Only as an example, a lawyer who was named executor of an estate in one of those peculiar wills which left \$10,000 for the care of a dog, purchased himself a brand new station wagon to transport the dog. Then he bought a washing machine from his daughter at a premium price in order to wash the dog's blankets; he took the dog on a vacation to the Grand Canyon, necessarily accompanied by the executor and members of his family. The bar recommended a two-year suspension, he was ultimately given a two-month suspension, which happened to coincide with his vacation in the islands west of us.

The chairman of a state bar association disciplinary agency reported that inadequate discipline results in a lack of confidence in the disciplinary process on the part of the profession generally:

Are the sanctions which are imposed in grievance procedures stringent enough to accomplish the objective of adequately protecting the public and policing the Bar? As a commissioner of the supreme court, I don't think it would be proper for me to second guess my employers. Let me say this, though; I think I can tell you what the reaction of the lawyer is to what the court does.

The reaction of most lawyers that I know to what the supreme court has done over the years in disciplinary matters is that the grievance procedure is in large part a paper tiger. They are familiar with the cases, and we have some where the evidence of ambulance chasing, for example, was overwhelming and inexcusable. And the penalty was censure or one year's suspension, something of that kind. And that has resulted in an attitude on the part of the bar that the grievance procedure is really not something to stand on at all.

The absence of any consistent approach toward violations of professional standards of conduct and the inadequacy of discipline imposed in specific cases are detrimental to the deterrent effect that should be an objective of disciplinary enforcement. The attorney who may be tempted to engage in serious misconduct is less likely to be deterred if he is aware that the possibility exists that if discovered he may be subject only to relatively insignificant discipline.

The absence of a consistent approach toward lawyer discipline further hampers the administration of high ethical standards by failing to provide judicial criteria for the disciplinary agency to follow in distinguishing between those cases that should be prosecuted in the courts and those that can be concluded at a

lower level in the disciplinary process. The chairman of a state bar disciplinary agency noted that the actions of the court affect the disposition of specific complaints by members of his agency:

Of course, we must be concerned, and we are concerned with the policy that may develop from the court—what the court will consider actionable misconduct. When we take a case up there, we don't know their policy and it would be difficult to ask in advance what they are going to do. On the other hand, we are a little hesitant to take the case up if we have a fear that the court is going to say they don't care too much about that, and in effect dismiss the matter.

We do not suggest that there cannot be variation between cases involving similar misconduct. Mitigating circumstances should be considered in determining the specific discipline to be imposed in cases that involve misconduct but do not necessarily warrant disbarment. The existence of persuasive mitigating circumstances may justify a long suspension for conduct that in their absence would result in disbarment. Mitigating circumstances, however, should not justify variations ranging from private censure to disbarment in cases involving similar misconduct. Nor should they be deemed relevant at all in cases involving misconduct that strikes at the very heart of the administration of justice and works a forfeiture of the malefactor's right to remain a member of the profession regardless of the circumstances. Examples are bribery and subornation of perjury.

What we are suggesting is that the court's approach to each individual case should demonstrate an awareness that the decision affects not only the specific attorney concerned but the substantive law of professional discipline as well. The application of this approach should manifest itself in disciplinary decisions obviously related to one another by a consistent philosophical outlook toward lawyer discipline, thereby enabling the disciplinary agency, members of the bar and anyone interested to predict within narrow limits the discipline likely to be imposed for any specific conduct.

The president of a local bar association contended that such a consistent approach does not now exist:

The development of an effective disciplinary proceeding needs some kind of basic doctrine in philosophy that addresses itself to this subject. Too often I find myself in these disciplinary proceedings as if I had only recently arrived from Mars and the whole subject was *de novo*; each case stands on its own facts. Each case is an examination into the matter.

With no disrespect for the supreme court, I challenge you to read

REPORT ON DISCIPLINARY ENFORCEMENT

the decisions and be able to make any reliable prediction of what will happen in the next case in terms of the measure of discipline that will be invoked or the degree of seriousness with which the particular misconduct will be viewed.

A philosophical approach toward lawyer discipline obviously cannot be developed without substantial consideration of relevant problems, policies and desired results. If the judge has had no occasion to confront these issues in the course of his prior experience, he can only be made aware of them by appropriate educational courses after he is on the bench. Judicial training centers in which instruction can be made available already exist and have in recent years been emphasized and expanded.

A member of the American Bar Association's Board of Governors urged that these courses be expanded to encompass both the substantive and procedural aspects of lawyer discipline in order to enable judges of courts having disciplinary jurisdiction to exercise their proper role in elevating ethical standards and eliminating those problems in disciplinary enforcement stressed in this report:

How are you going to have internal discipline as represented by whatever control there is within any given state if the men that sit in high places and make final decisions are not in accord with the basic concepts that the bar has generally attempted to administer?

There are judges' conferences being conducted everywhere. You have trial judge seminars. We have sections in the American Bar Association which conduct national institutes. We have many other seminars. Is it not possible somewhere to inject some idea among the judges who participate in these courses that attorney discipline is a part of their professional responsibility as a member of the judiciary and that they should have some knowledge and give some thought to it, because many obviously have not?

Problem 34

Attorneys accused of crime given preferential treatment by law enforcement authorities and the courts.

DIMENSION

Although one might reasonably expect that attorneys would be held to higher standards of conduct than laymen, those engaged in the administration of justice often appear to accord preferential treatment to attorneys accused of crimes. This may manifest itself in a high rate of dismissals in cases of attorneys accused of relatively minor crimes, acceptance of guilty pleas to lesser offenses, and imposition of relatively light sentences in cases in which attorneys have committed crimes of such major proportions that acceptance of a lesser plea would be unconscionable.

State bar counsel noted that preferential treatment caused public concern over the adequacy of attorney discipline generally:

It seems that the complaints I hear most often concern lawyers who are publicly accused of misconduct, where the public is aware of it, as, for example, where attorneys are charged with crimes and there is newspaper publicity. The public is unable to understand why the bar is apparently doing nothing when, as a matter of fact, we are usually proceeding, but with regard for the requirements of confidentiality of our rule.

After a period of sometimes two or three years while we are not permitted to discuss the proceeding with the public, a punishment is finally handed down which is often regarded by the public, and sometimes by the bar, as inadequate. For example, what I hear is a comparison with the man who is in dire straits and steals money, perhaps holds up a gas station, and is sentenced to ten to twenty years in our state prison, with a lawyer who embezzled \$30,000 or \$40,000 and receives a suspended sentence and perhaps no prison sentence at all.

RECOMMENDATION

Establishment of liaison with law enforcement agencies and criminal courts to foster awareness of problems in disciplinary enforcement resulting from their lenient treatment of accused attorneys and to develop appropriate procedures.

DISCUSSION

We have stressed throughout this report the necessity for avoiding actions and procedures that undermine public confidence in the legal profession by giving the impression that attorneys charged with the responsibility of passing judgment on the conduct of their brethren are less than impartial. The relevance of

that concern to disciplinary enforcement usually is acknowledged. Its relevance to criminal law enforcement is often overlooked.

One accused of crime is affected vitally by the judgment and decision of attorneys on the staff of law enforcement agencies and former attorneys sitting as judges on the bench. When the accused is an attorney, the criminal proceeding involves attorneys passing judgment on one of their brethren. Any appearance of partiality in that process undermines public confidence in the profession and presents a problem in disciplinary enforcement.

The preferential treatment often accorded attorneys by law enforcement agencies and courts undoubtedly reflects an awareness that the attorney convicted of crime is subject not only to a criminal penalty but to professional discipline as well. Convicted attorneys invariably seek to reinforce this attitude by arguing, at the time of sentencing, that the court should take into consideration the fact that their license will be in jeopardy. These pleas often are received sympathetically.

It is not unusual for a convicted attorney who successfully has obtained preferential treatment in the criminal case to seek lesser discipline in the subsequent disciplinary proceeding by arguing that he has already been tainted with the stigma of criminal conviction and that the criminal court could not have considered the criminal conduct as too serious since it imposed a relatively light sentence. When the attorney is successful in using one forum against the other, as he too often is, the public finds it difficult to reconcile the result with its concept of even-handed justice.

Preferential treatment accorded an attorney accused of crime not only undermines public confidence in the profession but directly interferes with effective disciplinary enforcement as well. Prosecutors usually are unaware of the procedures governing a disciplinary proceeding based on a criminal conviction. They do not realize that by accepting a plea of guilty to a lesser crime than that actually committed, the subsequent disciplinary proceeding either is seriously compromised or made substantially more complicated. The conviction, after all, cannot constitute more than proof of the lesser crime to which the plea was taken. Consequently, if the disciplinary proceeding is to consider, as it should, the full scope of the attorney's misconduct, actual proof of the more serious crime will have to be adduced. If any problem of proof exists, or if the crime involves an area of technical expertise the disciplinary agency is not equipped to handle, the

disciplinary proceeding may have to be limited to the lesser crime established by the conviction. If the lesser crime, as is usually the case, does not warrant the same discipline as the attorney's actual misconduct, a miscarriage of justice may occur, and an attorney who should be removed from the rolls will be permitted to resume practice after only a short suspension. Thus, by acquiescing in the lesser plea, the prosecutor and the judge inadvertently have complicated or even thwarted the disciplinary proceeding.

Prosecutors and judges often extend leniency on the basis of the accused attorney's plea that his license is in jeopardy, without determining the measure of discipline likely to be imposed as reflected in prior decisions of the local disciplinary authority involving similar misconduct. As a result, the sentence in the criminal case is occasionally suspended, although, in fact, the attorney faces no greater discipline than a short suspension. Had the prosecutor communicated with the local disciplinary agency, he would have ascertained that the extent of likely discipline did not warrant leniency in the disposition of the criminal case.

These and related problems result from a lack of familiarity with the disciplinary process on the part of those engaged in the administration of criminal justice. It is imperative that a liaison between disciplinary agency and prosecutor and criminal court judge be established to facilitate a dialogue concerning mutual problems arising from the treatment of attorneys accused of crime.

This approach has been used successfully in New York City. Prosecutors and judges have been made aware of the ramifications to disciplinary proceedings of their handling of criminal cases involving attorneys. A request by an attorney accused of a serious crime that he be permitted to plead guilty to a lesser crime, or that he be given consideration on sentence, predicated on the professional discipline he has yet to face, often is not considered unless the attorney tenders his resignation from the bar. Justice is well served thereby. The public is immediately protected from any further misconduct; disposition of the criminal case is made in light of the attorney's loss of license as he requested; and the integrity of bench and bar in the eyes of the public is preserved, because the attorney's loss of his license is disclosed immediately and the public is not subjected to the spectacle of an attorney who has committed a serious crime continuing to practice law.

We recommend the implementation of this approach. To that

end, it is suggested that every disciplinary agency establish liaison with the prosecuting agencies and criminal courts within its jurisdiction in order to institute a dialogue on problems in disciplinary enforcement involving the attorney accused of crime. An agreement should be obtained that in any case in which an attorney accused of serious crime requests leniency on the ground that his license to practice is in jeopardy, the disciplinary agency will be consulted concerning the effect of the disposition of the criminal case on any subsequent disciplinary proceeding. Arrangements also might be made for immediate notification of the local disciplinary agency when an attorney is arrested, in order to eliminate the possibility that an attorney guilty of crime may inadvertently escape the disciplinary process. In those jurisdictions in which the court having disciplinary jurisdiction is also responsible for the administration of the local trial courts, the disciplinary agency should request that the cooperation of the criminal courts proposed herein be made a matter of administrative direction.

In order to facilitate communication between disciplinary and law enforcement agencies, it is recommended that each agency appoint an attorney to serve as liaison representative to the other. That individual will quickly become sufficiently conversant with the other agency's concerns to enable him either to advise the members of his own agency whenever they must deal with routine matters affecting both agencies or to seek out the proper source to obtain necessary information when more complex matters arise.

Problem 35

No statewide registration of attorneys (applicable to nonintegrated jurisdictions only).

DIMENSION

There are twenty-one nonintegrated bar states. Since membership in a state bar association is not a prerequisite to practice, most of these states have no current record of active practitioners or their residences and office addresses. The president of a local urban bar association in one such state disclosed that there is no way to determine how many lawyers are actually admitted to practice:

Whether the lawyer population is 19,000, as was said, or 22,000, as we estimate, is a question because we don't have a system of enrollment and licensing annually, and it is difficult to know just how many lawyers there are. Our best estimate is that there are probably 22,000 lawyers of whom 14,000 or 15,000 reside in this county.

RECOMMENDATION

A court rule providing for mandatory periodic registration of all attorneys and immediate notification of any changes in residence and office address.

DISCUSSION

The absence of statewide registration leads to several obvious problems in disciplinary enforcement: (1) Inability to locate readily the current residence or office address of an attorney against whom a complaint is filed. (2) Inability to determine readily whether an attorney who can no longer be located at a former address has moved, abandoned his practice or died. (3) Inability to locate readily an attorney who has been disciplined in another jurisdiction.

The inability of a disciplinary agency to ascertain the whereabouts of attorneys within its jurisdiction not only hampers effective enforcement, but may cause relationships between the public and the bar to deteriorate. If the disciplinary agency advises the complainant that it is unable to locate his attorney and does not even know whether the attorney is alive, the complainant may conclude that the disciplinary agency is disorganized and inefficient. A client whose attorney has relocated without notifying him may face the prospect of losing his legal rights through no fault of his own. The client's respect for the integrity of the bar

REPORT ON DISCIPLINARY ENFORCEMENT

will hardly be enhanced by the experience of having first retained an attorney who neglects his interests and then being advised that the local disciplinary agency to whom he turns for help cannot assist him.

The proposed rule providing for periodic registration requires that retired attorneys file notice of intent to assume inactive status and that they be so carried until they apply for and are granted reinstatement. Attorneys assuming inactive status are required to continue to report any change of address in order that the disciplinary agency may be able to contact them during this period concerning any misconduct that may be alleged to have occurred while they were engaged in active practice. The retired attorney, of course, remains subject to the disciplinary power of the court and may have his license revoked.

PROPOSED RULE

A rule providing for periodic registration should include the following provisions:

1. Every attorney periodically shall file with the agency appointed to administer registration a statement setting forth relevant information, including his date of admission, current residence and office addresses, and other jurisdictions in which he is admitted. The rule also should require that a supplemental statement be filed with the agency appointed to administer registration within a specified time after any change in any of the information previously submitted.

2. The agency appointed to administer registration shall within a specified time after receipt of the required registration statement forward to the attorney a written receipt, in order to enable the attorney on request to demonstrate compliance with the registration requirement.

3. Failure to file the required registration statement shall itself warrant the summary suspension of the attorney.

4. An attorney who has retired or is not engaged in practice shall advise the agency appointed to administer registration in writing that he desires to assume inactive status and he shall continue to file registration statements thereafter in order that he can be located in the event complaints are made about his conduct while he was engaged in practice.

5. Upon filing a notice to assume inactive status, an attorney shall be removed from the roll of those classified as active until and unless he moves for and is granted reinstatement to the active rolls.

Problem 36

Limited ancillary bar association services to complement the work of disciplinary agencies.

DIMENSION

One of the important goals of effective disciplinary enforcement is the improvement of relations between the public and the bar. Disciplinary agencies receive a substantial number of complaints outside their jurisdiction, such as those involving fee disputes, requests for legal assistance, isolated claims of malpractice, and requests for reimbursement for defalcations. These complaints, nevertheless, are of as much concern to the laymen who make them as are complaints of professional misconduct that do fall within the jurisdiction of the disciplinary agency. So the manner in which these complaints are handled also affects the public attitude toward the bar.

RECOMMENDATION

Establishment of (1) procedures for handling claims against attorneys; (2) procedures for arbitrating fee disputes; and (3) client security funds.

DISCUSSION

There are three principal areas in which the profession can provide services to complement the work of the disciplinary agency and contribute to improving the relationship between the public and the bar. These concern persons who need or seek counsel to represent them in claims against attorneys, persons who dispute the fees charged by their attorney, and persons who have been the victims of defalcation by an attorney.

Procedures For Handling Claims Against Attorneys

The layman who has a legitimate claim against an attorney often is unable to obtain counsel to represent him. It is not unusual for attorneys to criticize members of the medical profession who are reluctant to testify in support of justified medical malpractice claims. Attorneys will point out that such "camaraderie" perpetuates injustice by making it impossible for the injured claimant to recover for his damages. Unfortunately, the legal profession is subject to the same criticism. The layman who seeks an attorney to represent him in prosecuting a valid claim against another attorney often finds that it is impossible to

do so. The vice chairman of a state bar disciplinary agency described the difficulty he encountered when he attempted to locate counsel for a woman who had a claim against an attorney:

Another thing with which we are confronted is the problem of getting a lawyer to sue a lawyer. We recently had before the committee a woman who appeared to have a meritorious claim against a fairly prominent lawyer. It took the governor, the secretary of state, the attorney general, and nine members of the committee to scour the state, and we finally found a lawyer through the Martindale-Hubbell directory who agreed to handle the matter.

Many attorneys will not consider making a claim against another, regardless of the merits of the matter. A state court administrator explained the dimensions of this problem as it exists in his state:

I would like to mention that the bulk of the cases that come to my attention and the attention of the members of committees and officers of bar associations do not involve unethical or unprofessional conduct which could result in discipline. They involve incompetence.

The answer you give to the client in those cases is that he doesn't have an ethics matter but he may have a civil action. They will tell you that they have been to ten or twenty or thirty lawyers and they can't get one to take their case.

We find it easy to recognize the deficiencies in other professions in this regard. But we fail, I think, sometimes to recognize that a similar situation exists within the legal profession, because while you may not be able to get a medical witness, if you have a malpractice case, at least you can get into court because you have a lawyer. But with respect to a claim against an attorney, a person can't even get to first base.

We have tried an experiment that is working fairly well, that might be the sort of thing that could be considered in this regard. We have established with the cooperation of the medical society, a medical malpractice screening program, in which complaints against doctors are considered by a board, a panel composed of two lawyers, a former judge and two doctors. If they find that there is a reasonable basis for the claim, and that is the only determination they make, the medical society has agreed to provide medical experts for the complaining party. This is their attempt to indicate as a profession in the state that the conspiracy of silence is something that they themselves don't like.

Perhaps some such program as this might also fit within the legal profession, where a person who has a possible claim of malpractice against an attorney, which ordinarily would be thrown out as a disciplinary matter, might be presented to a board which would decide whether or not there was any reasonable basis for it and then you have a panel of lawyers who would agree to undertake that sort of case.

It is, of course, evident that the layman who finds himself unable to pursue a legitimate claim against an attorney because he

cannot find counsel to represent him will not be very impressed with the integrity of the profession. The American Bar Association's Committee on Professional Ethics noted in Opinion 144:

We are of the opinion that it is not professionally improper for a lawyer to accept employment to compel another lawyer to honor the just claim of a layman. On the contrary, it is highly proper that he do so. Unfortunately, there appears to be a wide-spread feeling among laymen that it is difficult, if not impossible, to obtain justice when they have claims against members of the bar because other lawyers will not accept employment to proceed against them. The honor of the profession, whose members proudly style themselves officers of the court, must surely be sullied if its members bind themselves by custom to refrain from enforcing the just claims of laymen against lawyers.

It is less evident that our procedures in disciplinary enforcement compound this problem. Most disciplinary agencies do not consider isolated malpractice to constitute grounds for discipline. Some do not even regard unexcused neglect resulting in the loss of the client's right to a remedy to be properly the subject of discipline. The layman who has been the victim of an act of malpractice or of neglect and who files a complaint with a disciplinary agency is usually advised that the matter falls outside its jurisdiction and that he should consult an attorney to prosecute a civil claim. The layman who acts upon that advice, given to him by an official agency of the profession, and then finds that no attorney will undertake the matter, may conclude that the profession is engaged in a conspiracy to protect its members.

It is imperative that bar associations establish a procedure to enable laymen to find counsel to represent them in legitimate claims against attorneys. It will be difficult to find attorneys who are willing to handle these claims on a regular basis. It may be possible, however, to create a panel of attorneys who would accept them in rotation.

Arbitration of Fee Disputes

Fee disputes between attorney and client not amounting to overreaching ordinarily do not constitute misconduct and also fall outside the jurisdiction of disciplinary agencies. If a client files this sort of complaint and is told that nothing can be done for him, he may conclude that the profession is unfairly protecting his attorney. Advising him that he may go into court and sue the attorney for a refund will not satisfy him either. The client may find it difficult to locate an attorney willing to sue another; he is

reluctant to pay a further legal fee; and he may assume that judges are part of a general conspiracy to protect their fellow attorneys.

A number of bar associations have created committees for arbitration of fee disputes. Their experience indicates that with rare exceptions the fee charged is adjudged reasonable. This means that in most instances the layman is advised that a bar association committee composed entirely of attorneys has considered the fee and has found it to be reasonable and proper. The layman may conclude that a group of attorneys is protecting one of its own. Such a bar association committee is not likely to be an effective vehicle for improving the relationship between the public and the bar.

The Association of the Bar of the City of New York has attempted to resolve the problem of fee disputes by arranging with the American Arbitration Association for arbitration when the amount in controversy is more than \$150. This arbitration association has no connection with the organized bar and many of its arbitrators are not attorneys. The client whose fee dispute is arbitrated by an association outside the organized bar is more likely to conclude that he has been afforded a fair and impartial hearing.

Client Security Funds

The jurisdiction of disciplinary agencies over complaints alleging misappropriation of funds by attorneys is limited to the institution and prosecution of a proceeding seeking the imposition of discipline. The disciplinary agency has no jurisdiction to seek recovery of the monies due the client, and the imposition of discipline is of no practical assistance to the client who is faced with the loss of his funds. The creation of a security fund to make full or partial restitution to the client can serve as a tangible demonstration of the concern and responsible attitude of the bar. In urging the creation of such a fund, a California appellate court stated in *Blackmon v. Hale*, 78 Cal. Rptr. 569, 582-583 (1969):

Such measures as periodic audit and summary accounting in court are designed to safeguard clients' money in the hands of attorneys before misappropriation, misapplication, or embezzlement occurs. But in addition to these ounces of prevention some pounds of cure in the shape of a client's security fund are required. Although a few voluntary bar associations, such as the Los Angeles County Bar Association, have commendably attempted to fill the gap by the creation of client's security funds to cover its members in limited amounts, these funds may fail to cover those attorneys for whose

activities the protection of a security fund is most needed. We do not think any voluntary plan of limited coverage furnishes an adequate solution to the problem of client security. A statewide clients' security fund is long overdue, and we urge the State Bar of California to adopt both the preventive and the compensatory measures which have demonstrated their effectiveness elsewhere.

Moreover, publicizing reimbursement from client security funds will alert the public to their availability and will cultivate a better image of the profession.

A number of ancillary problems arise concerning the maintenance of a client security fund—funding, limitations on claims, and procedures for establishing the validity of claims.

The advocates of client security funds assert that the funds reflect a recognition by the members of the profession that they bear responsibility toward clients for the conduct of their brethren. They contend that the creation of the funds reflects the same philosophy which holds that discipline should be enforced by those within the profession rather than outsiders. Consequently, client security funds are usually funded by the members of the profession themselves. This requires that each attorney be assessed periodically an amount proportionate to the total fund to be maintained as determined by an analysis of established attorney misappropriations over a period of several years, adjusted by any limitation on the amount of each claim the fund will pay.

Some limitation must be placed on the amount a single individual can collect from a client security fund. Otherwise, one victim of a very substantial misappropriation can deplete the entire fund, leaving nothing to compensate others. Limitation is not a novel concept; it is used widely in the field of automobile insurance in connection with the establishment of funds to compensate victims of unidentified or uninsured motorists. A reasonable limit can be determined by a careful analysis of the number of claims likely to be substantiated, based on prior years' experience in disciplinary matters.

Public awareness of the existence of a client security fund undoubtedly will result in an increase in the number of complaints alleging attorney misappropriation. This will be particularly true when the client whose money has been misappropriated consults other counsel. At present the new attorney, who is often reluctant to report another attorney to the disciplinary agency, may limit his efforts on behalf of the client to conventional collection procedures. The former chairman of a state disciplinary commis-

sion noted, however, that once a client security fund is in existence, the new attorney is more likely to report the matter to the disciplinary agency:

One of the things that was mentioned this morning was the client security fund. The rule of our court under which we operate provides that a recovery against that fund may be awarded only when there has been a report to the disciplinary body, to the censor committee. This may to some extent overcome the reluctance of attorneys to report instances of professional misconduct by encouraging early reporting in order to make a claim against the fund.

Creation of a client security fund also will result in the filing of claims by those not eligible for reimbursement. We may anticipate that those who have lost funds in the course of legitimate business transactions with attorneys, or those to whom attorneys are merely indebted, will make attempts to obtain payment from a security fund by alleging misappropriation. Some procedure should be evolved for making a final determination as to whether a claimant's losses are caused by attorney misappropriation. The simplest method to accomplish this, and the one that involves the least additional burden on the disciplinary agency, is to limit reimbursement from the client security fund to those whose complaints have resulted in the imposition of discipline against the attorney concerned. Thus, payment from the fund would be made only after a judicial determination that the loss has been the result of attorney misconduct.

SECTION IV

ATTEMPTS TO PROVIDE MORE EFFECTIVE DISCIPLINARY ENFORCEMENT

Many jurisdictions, prompted by the formation of this Committee and the surveys and hearings it has conducted throughout the nation, already have embarked on efforts to achieve more effective disciplinary enforcement without awaiting the Committee's final report.

In the Third Judicial Department in New York, the presiding justice restructured and centralized the disciplinary process. The cooperation of the New York State Bar Association in this project earned it the American Bar Association's Award of Merit in 1969.

Kentucky and Florida recently have adopted new rules substantially revising their disciplinary procedures. Many other states and local jurisdictions have appointed committees to study their disciplinary structures and to recommend needed changes. This Committee has made the services of its Reporter available to these local committees to assist them in evaluating those aspects of their practice and procedure that require improvement and to make available the collective knowledge and experience accumulated by this Committee from disciplinary agencies around the country. Consultations have been held with committees in Utah, Illinois, Ohio, Pennsylvania and Michigan.

These concrete demonstrations of a desire on the part of local authorities to reform the disciplinary process are encouraging. The Committee recognizes that reforms in structure and procedure are

inadequate without a commitment on the part of those who are responsible for the operation of the disciplinary process in each of the states to achieve effective enforcement. It is significant that the judiciary and the organized bar throughout the nation have extended their full cooperation to this Committee. Their frank disclosure of their problems and their determination to resolve them evidence an awareness of the need for reform and a commitment to effective disciplinary enforcement. Whether the profession can adequately fulfill its responsibility of keeping its own house in order will depend in the long run on the scope and durability of that commitment.